FOREWORD.

The inquiry proceedings in what is called "The Kashmir Conspiracy Case" against Sh. Moh'd Abdullah and 24 others, are going on in the Committing Court of Shri Nil Kant Hak at Jammu. Very scrappy and sketchy reports, often giving only the one-sided prosecution version of these proceedings, have appeared in the Press. At times even these reports have been distorted. With a view to place before the public at large, the correct and complete picture of the proceedings, we undertook publication of these proceedings on the basis of certified copies of the various petitions and Court Orders passed from time to time. Obviously this huge task of publication can be done only in installments. One such installment is here for the reader.

This is the third volume in the series and covers some issues raised by the defence and Court orders thereon, from the special Magistrate right up to the High Court of Jammu and Kashmir to whom the issue was taken after rejection by the lower Courts. The volume comprises of 8 chapters.

BOOK AT A GLANCE.

Chapter I—Production of documents.

On 11-6-1958 the accused applied for the production of documents and diaries and other police reports on which the prosecution rely. This was rejected. Relevant applications and orders are reproduced in extenso.

Chapter II—Prosecution witnesses.

On the persistent request by the accused for the supply of list of witnesses, the prosecution presented the first provisional list giving names, vaguely and without particulars. The defence protested and the prosecution submitted further lists. All these lists, along with incidental applications and counter applications with Magistrate's Order, are reproduced here.

Chapter III—"Opening address."

The Prosecution claimed to deliver an opening address before any evidence was led in the case, under section 208 (1) Cr. P. C. The defence contested this right and after rejection of the defence plea took the issue to Sessions Court and finally to the High Court. All relevant proceedings are reproduced hereunder.

Chapter IV—Deferment of order.

The High Court in dismissing Sh. Moh'd Abdulla's transfer application on 22-1-59 made certain observations regarding inapplicability of S. 207—A, Amended Criminal Procedure Code. Actually this issue was at that time sub-judice before the learned Magistrate. He was, therefore, requested by the defence to defer his decision, till the Hon'ble High Court was moved for expunction of said observations U/s 561-A, Cr. P. C.

The relevant petitions and orders are reproduced hereunder.

Chapter V—Act XLII.

Act XLII of 1956 is an amendment to the Code of

Criminal Procedure on the same lines as the Central Amended Criminal Procedure Code of 1955. The question of enforcement was raised by the defence and opposed by the Prosecution. The issue was taken to the Hon'ble High Court, which also rejected the defence contention. This chapter incorporates the relevant proceedings.

Note :—*In one aspect the Chapter is a continuation of proceedings referred to under Chapter I.*

Chapter VI—Foreign Nationals.

Amongst the 25 accused, 5 persons are foreigners, being the Pakistan Nationals, against whom abscondence proceedings were taken by the Magistrate U/s 512 Cr. P. C. The issue was taken right up to the Hon'ble High Court as the other accused took exception of being tagged on with the Pakistan Nationals in this trial. The relevant proceedings from the Lower Court right up to the High Court are reproduced under this chapter.

Chapter VII—Approvers' Custody.

In this case the approvers are kept in custody in Srinagar whereas the inquiry is going on in Jammu. The defence prayed that the said "approvers" be kept in custody at Jammu. The prayer was rejected. The defence applications and prosecution rejoinders are reproduced in extenso.

Chapter VIII—Torture application by G. M. Chikkan.

Some of the accused persons—very respectable citizens and distinguished ex-officers of the Government were kept in what is known as Central Interrogation Centre at Srinagar (before the Conspiracy case was instituted). In the first volume of these series we published applications made to the Learned Magistrate. On the first day of his appearance in the Court, by three such accused, detailing the account of their experiences in the Interrogation Centre, Mr. Ghulam Moh'd Chikkan, an ex-director of Food Control and an accused in this case, has also set out his experience in the Interrogation Centre. This is published hereunder.

(4) Order of the Session Judge on the above dated 19-6-1959.

(5) Petition of the accused to High Court on the subject under revision dated 15-7-59.

(6) Letter to the Deputy Registrar for personal appearance dated 15-7-59.

(7) Advocate General's rejoinder dated 13-8-59.

(8) Reply to the Advocate General's rejoinder dated 20-8-59.

(9) Telegram to the Chief Justice dated 11-9-59.

(10) Letter to the Deputy Registrar dated 12-9-59.

(11) Sadar-i-Riyasat's Notification U/A 101 of Kashmir Constitution.

(12) High Court decision dated 24-9-59.

VII. Approvers' Custody.

(1) First application by the accused regarding custody of the approvers dated 11-6-58.

(2) Second application dated 26-5-59.

(3) Third application on the above dated 1-6-59.

(4) Reply to the above by the Prosecution on 1-6-59.

(5) Counter reply to the above by the defence on 2-6-59.

(6) Reply to the above by Prosecution on 8-6-59.

(7) Reply of the defence on the above dated 10-6-59.

(8) Order of the Court on the above on 15-6-59.

VIII. Torture application by G. M. Chikkan.

(1) Statement of Mr. Ghulam Mohd. Chikkan before Special Magistrate, Kud, dated 11-6-59.

(2) Written statement regarding treatment at the Interogation Centre, Srinagar, dated 24-6-59.

(3) Denial of the charges by the Public Prosecutor, dated 25-6-59.

(4) Application by Mr. Chikkan in support of torture etc. meted to him at interogation Centre dated 29-6-59.

(5) Public Prosecutor's Application dated 30-6-59.

(6) Order by the Special Magistrate dated 4-7-59.

CHAPTER I.

IN THE COURT OF SPECIAL MAGISTRATE, KUD.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS.

[11/6/51. Presented by Mr. Mani Advocate. Sd./ N.K. Hak, Special Magistrate.]

Offence U/S 120-B etc.

Application for direction to the prosecution to produce the list of the witesses and documents which they rely and the case diary in this case:

Respectfully shewth :—

1. That the complaint under sections 121, 120-B, R.P.C. and other sections and Rule 32 was lodged before this Court on 21-5-1958.

2. That the complaint is too vague to give any indication of specific accusation to each of the accused. The complaint has been so drafted as to include any number of persons in a 'drag-net' manner.

3. That the complaint itself does not contain the names of witnesses nor the documents on which the prosecution relies.

4. That a fair trial connotes that each person should have notice of specific allegation of facts constituting the offence which he has to meet.

5. That under the law in force in India as well as under the Chapter of Fundamental Human Rights of the United Nations Charter to which India is a party the accused is entitled to know the specific accusations, the names of prosecution witnesses who are to be examined at the enquiry and to obtain the copies of the documents on which the prosecution relies.

6. That today is the first hearing of the case, the Hon'ble Court should ascertain the names of the witnesses from the complainant and ask the complainant to file documents.

7. That according to para 15 of the complaint, the complaint purports to be a police report of the facts constituting the offence of contravention of the Rule 32 of Security Rules.

8. That according to the complaint the investigation of the offences started in October 1957 and the statement of the witnesses must have been recorded by the police under S. 101 and case diary must have been kept according to sec. 172, Cr. P. C.

PRAYER.

Under these circumstances set forth above, it is respectfully prayed that :—

1. the prosecution be directed to supply the list of the witnesses today and to produce the documents on which it relies.

2. That the case diary of the case be droduced before the Court so that there is no likelihood of tampering with it.

Sd. PIR GHULAM RASUL.

Through

Sd. D. R. PREM

(Mr. Daulat Ram Prem)

Senior Advocate, Supreme Court.

Dated.....

IN THE COURT OF SPECIAL MAGISTRATE, KUD.

STATE *vs* MIRZA MOH'D AFZAL BEG AND OTHERS.

[9/6/1958. Presented by Mr. Prem Advocate. Sd. N. K. Hak, S. M.]

Application U/S 208 (3), Cr. P. C. for summoning documents.

Respectfully shewth :—

That the following documents are absolutely necessary to enable the accused persons to cross-examine the Prosecution witnesses effectively and to promote the ends of justice and fair trial :—

1. F. I. R. No. 100, dated 9-10 1957 which is mentioned in the complaint filed by the Inspector-General of Police.

2. The case diary of the case relating to the F. I. R. mentioned in para 1, Supra.

3. All the police diaries relating to the investigation of the case U/S 120-B, 121-A, R. P. C.

4. Police diaries relating to the case against the accused under R. 32 of the Security Rules as mentioned in the complaint.

5. All other documents on which the prosecution relies in this case.

Sd. MIR GHULAM RASUL, *Accused,*

through

Date..... D. R. PREM.

(Mr. Daulat Ram Prem),

Senior Advocate.

IN THE COURT OF SPECIAL MAGISTRATE, JAMMU & KASHMIR.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS.

Under Section 121-A, R. P. C. etc.

Order of the Court on the application of D. R. Prem, Senior Advocate, Supreme Court, dated 9-6-1958.

Counsel for the prosecution undertakes to try his best to produce all the relevant documents pertaining to this case as soon as possible. He says that he will require some time to be in a position to file the required documents as he does not want to unnecessarily burden the defence with documents not relevant and necessary to this case and this shifting is sure to take time which be put at least about a month. He further says that case F. I. R. No. 100 of 1957 is a separate case and in this case we are only concerned with the documents pertaining to this case.

Prosecution will try to produce all the relevant documents pertaining to this case as soon as possible and counsel for prosecution is directed to see that it is done as early as possible. Counsel for the accused feels satisfied with this direction.

Announced.
11-6-1958.

Sd. N. K. HAK,
Special Magistrate.

IN THE COURT OF SPECIAL MAGISTRATE, JAMMU.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS.

Under Section. 121-A, R. P. C. etc.

[Presented by Mr. Beg accused file. Sd. N. K. Hak, S.M. Dt. 28-11.]

Respectfully sheweth :—

1. On 11th June 1958 the petitioners accused in this case submitted an opplication praying for the production of

documents on which the prosecution rely.

2 That the public prosecutor, Mr. R. K. Kaul, in reply to petitioners said application gave an assurance on 11-6-58 that the prosecution was in process of sorting out, arranging and listing up the documents, which will be produced soon before the Court

3. That on the said date the court passed an order directing the prosecution to produce the relevant documents as soon as possible.

4. That the petitioners entertain now as heretofore grave apprehensions in regard to fabrication of documents. Hence they have been insisting on their earliest production before the Court which in law is the only safeguard against such fabrication.

5. That though the petitioners filed the said application on the very first day the accused were brought and produced before the Court, the prosecution have not so far produced the said documents, notwithstanding the fact that nearly six months have elapsed since the case was instituted. This undue delay has and is seriously operating to the prejudice of the accused.

6. That moreover the proceedings have reached a stage when material witnesses for prosecution are to be examined from day to day.

7. That in order to enable the accused to effectively cross-examine the prosecution witnesses, prior examination of the said documents is not only essential but inevitable to promote the ends of justice and fair trial.

8. That though the prosecution are trying to make an exception in the case of F. I. R. 100, dated 9th October 1957 it is essential in the ends of justice that this document and connected papers and police diaries be also brought on the file so as to facilitate cross-examination of the prosecution witnesses in accordance with law and justice.

9. That the prosecution have not only deliberately omitted to produce any document referred to above but have even failed to file in the Court papers alleged to have been

recovered at the time of arrest of the 'approvers' so called. Even other statements made by these 'Approvers' are not on the file. The greatest prejudice to the accused is obvious.

10. That the prosecution were bound by law to produce all documents and police diaries in relation to the case when it came before the Court. Further delay in the production of documents is seriously jeopardizing the rights of the accused guaranteed by law.

11. That inclusion of Sh. Mohd. Abdullah amongst the accused though its legality is still subject to Court's pronouncement, has further emphasised the need of early production of documents.

12. The accused pray that the prosecution may finally be directed to produce the documents without further delay and well in advance of the examination of the prosecution witnesses.

Dated 28-11-58.

Sd. 1. Ghulam Mohi-ud-din.
2. Sofi Mohd. Akbar.
3. Ali Shah.
4. Mohi-ud-din
5. M. A. Beg.
6. Mirza Mohd. Afzal Beg and others.
7. Mir Mohd. Nazir.
8. Pir Abdul Afzal.
9. Pir Abdul Ghani
10. G. K. Beg.
11. Ghulam Mohd. Chikken.
12. Ali Shah.
13. Ghulam Rasool.
14. Mohi-ud-din.

Counsel for the parties and the accused present.

Mr. Beg says that he would be supplying a copy to the prosecution. This may be put up for arguments along with other similiar application tomorrow the 29th of November 1958.

Announced.
28-11-58.

Sd. N. K. Hak,
Special Magistrate.

Counsel for the parties and the accused present arguments concluded. Decision reserved.

Announced.
7-2-59.

Sd. N. K. HAK,
Special Magistrate.

CHAPTER II.

In the Court of Shri N. K. Hak, Special Magistrate, Jammu & Kashmir.

In Re:

State of Jammu & Kashmir Complainant.

Versus

Mirza Afzal Beg & others Accused.

[Presented by Sh. R. K. Kaul P. P. Sd. N. K. Hak, Special Magistrate, 27-6-58.]

Provisional list of witnesses.

1. Sheikh G. Qadir, I. P. S., S. P.
2. S. I. R. Chand.
3. S. I. G. H. Shah.
4. S. I. A. K. Sheikh.
5. S. I. R. A. A. Khan.
6. A. Beg.
7. M. Akbar.
8. M. Mohammed.
9. Z. Parey.
10. P. A. Mohammed.
11. H. C. H. Chand.
12. A. Loan.
13. M. A. Baksh.
14. S. U. Shah.
15. P. G. Hassan, Inspector Police.
16. S. A. Singh.
17. M. M. Makhdoomi.
18. G. M. Gilkar.
19. G. M. Butt.
20. G. Khan.
21. K. A. Khan.
22. M. Khan.
23. R. Pandit.
24. M. Y. Beg.
25. B. A. Butt.
26. G. N. Mir.
27. H. Ganai.
28. Mir Mohammed.
29. A. Butt.
30. A. U. Mir.
31. A. G. Butt.
32. A. U. Beg.
33. M. S. Butt.
34. M. Ramzan.
35. G. Mohammed.
36. G. Ahmed.
37. M. A. Sheikh.
38. M. Abdullah.
39. M. Sultan.
40. S. Dass.
41. Shanker Dass.
42. S. S. Singh.
43. K. Hussain.
44. G. Q. Rigu.

45. J. Nath.
46. Fateh.
47. H. C. M. Afzal.
48. F. A. Khan.
49. H. Ullah.
50. S. Gujar.
51. G. Nabi.
52. G. Qadir.
53. A. Mohammed.
54. P. Nand.
55. M. Khalil.
56. F. M. Khan.
57. M. A. Khan.
58. A. R. Nanda.
59. G. Ahmed, Darzi,
60. M. Ganai.
61. G. N. Handu.
62. A. Mir.
63. A. Sheikh.
64. D. Nath.
65. G. Sofi.
66. Q. Malik.
67. P. M. Yahia.
68. G. Rubani.
69. F. D. Gujar.
70. A. Aziz.
71. Pt. T. N. Mattu, A.D.M.
72. M. M. Sharif, M. I. C., Srinagar.
73. S. Mohammed.
74. M. A. Khan.
75. Dr. S. N. Nath.
76. M. Butt.
77. G. Rasool.
78. S. U. Butt.
79. A. G. Pandit.
80. Kalu.
81. G. E. Q. D.

Note:—The above is a provisional list of prospective witnesses and is not the final list. The petitioner craves leave to furnish a further list of witnesses.

Dated 26th June, '58.

Sd. RADHA KISHAN KAUL.
P. P.

LIST OF PROSECUTION WITNESSES.

1. Sh. Attaullah Beg s/o Saidullah Beg r/o Village Sultanpur Kandi, Tehsil Baramula.
2. Sh. Ghulam Mohd. Butt s/o Abdulla Butt r/o Akilmar Khanyar, Srinagar.
3. Sh. Zaman Parey s/o Samad Parey r/o village Balakot, Tehsil Uri.
4. Sh. Pir Atta Mohd. s/o Zaiduddin r/o Thindam, Tehsil Baramula.

5. Sh. Sanaullah s/o Sayed Ali Shah r/o Katapora Kazipura, Tangmarg, Baramula.
6. Sh. Ghulzar Khan s/o Asadullah Khan r/o Alucha Bagh, Srinagar.
7. Sh. Mohd. Akbar Baksh s/o Karam Baksh r/o Chak Treran, Tangmarg, Tehsil Baramula.
8. Sh. Kabir Ahmed Khan s/o Fateh Mohd. Khan r/o village Khudpura, Tehsil Baramula.
9. Sh. Mohd. Yasin Beg s/o Sulaiman Beg r/o village Chandusa, Tehsil Baramula.
10. Sh. Asadullah Beg s/o Maulvi Saidullah Beg r/o village Sultanpur Kandi, Tehsil Baramula.
11. Sh. Mohd. Yusaf Beg s/o Ghulam Mohiuddin Beg r/o Kachhu Muqam, Tehsil Baramula.
12. Sh. Mohd. Sharif Beg s/o Ghulam Mohiuddin Beg r/o Kachhu Muqam, Tehsil Baramula.
13. Sh. Bashir Ahmad Butt at Shahbaz s/o Ali Mohd. Butt r/o Mohalla Dombpura, Basant Bagh, Srinagar.
14. Sh. Ghulam Nabi s/o Habibullah Mir r/o Chinkral Mohalla, Srinagar.
15. Sh. Mohd. Sultan Butt at Ghaznavi s/o Sanaullah Butt r/o Dombpur, Basant Bagh, Srinagar.
16. Mohd. Ramzan Karnai s/o Ahmad Joo Karnai r/o Dombpura, Basant Bagh, Srinagar.
17. Sh. Ghulam Mohd. Wasil s/o Umar Joo r/o Mohalla Khawaja Sahib, Baramula.
18. Sh. Shankar Dass s/o Bhagat Ram r/o Parli, P.S. Jhajjar Kotli, Tehsil Jammu.
19. Sh. Shankar Dass s/o Nathu Ram r/o Chenani, Distt. Udhampur.
20. Sh. Sadhu Singh s/o Chattar Singh r/o Doda, Distt. Doda.
21. Sh. Karamat Hussain s/o Mohd. Akram r/o Gulgam, Tehsil Handwara at present Maisuma, Srinagar.
22. Sh. Farman Ali Khan s/o Rajwali Khan r/o Chandusa, Tehsil Baramula, now Chaprasi Demarcation Divisien, Forest Dept., Baramula.
23. Sh. Hafiz Ullah Beg s/o Ghulam Mohd. Beg r/o Balkote,

Tehsil Uri, Distt. Baramula.

24. Sh. Shahia Gujar s/o Maula Gujar r/o Chotali Bonyar, Tehsil Uri, Distt. Baramula.
25. Sh. Permanand s/o Kashmiru r/o Bachhal, Tehsil Chenani, Distt. Udhampur.
26. Sh. Fida Mohd. Khan s/o Atta Mohd. Khan r/o Batmalu, Srinagar.
27. Sh. Mohd. Afzal Khan s/o Saeed Mohd. Khan r/o Batmalu, Srinagar.
28. Sh Ghulam Nabi Handu s/o Ghulam Ahmed Handu r/o Tulwari, P. S. Uri.
29. Sh. Ahad Mir s/o Ahmad Mir r/o Raincho Gund, P. S. Doru, Distt. Anantnag.
30. Sh. Ghani Soofi s/o Fateh Soofi r/o Naugam Doru, Distt. Anantnag.
31. Sh. Ghulam Rabbani s/o Sultan Mohd. r/o Hachmarg, Tehsil Handwara.
32. Sh. Fazaldin Gujjar s/o Maula Baksh r/o V. Hangani Kot, Tehsil Handwara.
33. Sh. Abdul Aziz s/o Alif Din r/o V. Sochalyari, Tehsil Handwara.
34. Sh. Sultan Mohd. s/o Faqir Mohd. r/o V. Tulawari, Tehsil Handwara.
35. Sh. Mohd. Amin Khan s/o Hayat Khan r/o V. Kotlari, Mawar, Tehsil Handwara.
36. Dr. Shanker Nath Ganju, Deputy Director Medical Services, Srinagar.
37. Dr. S. S. Gupta, Ex. Supdt. Jail and Medical Officer, Kud.
38. Dr. Devraj Oswal, Civil Surgeon, Kathua.
39. Sh. Sheikh Ferozuddin Supdt. Jail, Jammu.
40. Sh. Sanullah Butt s/o Khawaja Ghulam Ahmad Jan r/o Bagh Yas, Editor "Daily Aftab", Srinagar.
41. Sh. Amma Pandit s/o Mehda Joo r/o Mohalla Qazi Hamam, Srinagar.
42. Sh. Girdhari Lal Anand s/o L. Javanda Mal r/o Mohalla Jat Katian, Jammu.
43. Sh. Ali Mohd. Pathan s/o Raj Mohd. Pathan r/o Lanilab

Gurwat, Tehsil Badgam, Distt. Srinagar.

44. Sh. Ali Mohd. Hashia s/o Ghulam Mohd. Hashia r/o Mohalla Sayeed Ali Akbar, Srinagar.
45. Sh. Ahsan Rathar s/o Samad Rather r/o Balapura, Tehsil Pulwama.
46. Sh. Abdul Aziz Dar "Parwana" s/o Ghulam Ahmad Dar r/o Solina Pain now lodged in Judicial lock-up, Srinagar.
47. Sh. Sidha Mir s/o Ahmad Mir r/o Tulawari, Tehsil Uri.
48. Sh. Mohibullah Beg s/o Ghulam Murtza Beg r/o Balkot, Tehsil Uri.
49. Sh. Aziz Lone Lambardar s/o Hamza Lone r/o V. Thindam, Tehsil Baramula.
50. Raja Sarbaland Khan r/o Nambala, Tehsil Uri, Distt. Baramula—Tehsil National Conference President.
51. Mehar Nur Jamal Gujjar s/o Fateh Mohd. Gujjar r/o Nandi Marg, P.S. Shopian.
52. Pir Ghulam Hussain, Police Inspector, Sopore.
53. Sardar Amarjit Singh s/o Sardar Atma Singh r/o Lal Chowk, Srinagar.
54. Sh. Mohd. Maqbool Makhdoomi s/o Pir Ghulam Mohiuddin Shah r/o Makhdoomi and Mandau, Srinagar.
55. Sh. Ghulam Mohd. Gilkar s/o Mohd. Ismail r/o Maisuma, Srinagar.
56. Sh. Mutwali Khan s/o Majnu Khan Orul r/o Tri Kanjan, Bonyar, Tehsil Uri.
57. Sh. Rasool Pandit Chowkidar r/o Sala San Bonyar, Tehsil Uri.
58. Sh. Habib Ganai Chowkidar; Ferozapura, P.S. Gulmarg.
59. Sh. Mir Mohd. s/o Dost Mohd. r/o Chak Ferozapura, Tangmarg.
60. Sh. Ahad Butt Chowkidar r/o Hachimarg, Tehsil Handwara.
61. Kh. Asadullah Mir s/o Ghulam Hassan Mir r/o Batagund Tral, Tehsil Pulwama.
62. Sheikh Abdul Karim, S. I., Police Lines, Srinagar.

63. Sh. Abdul Ghani Butt s/o Kh. Rasool Butt r/o Avantipura.
64. Sh. Ghulam Ahmad Shapoo s/o Ghulam Mohd. r/o Mohalla Hazratbal, Anantnag.
65. Sh. Mohd. Amin Sheikh s/o Mohd. Sultan Sheikh r/o Mohalla Kadipura, Anantnag.
66. Sh. Ghulam Hassan Shah, S. I., C.I.A., Srinagar.
67. Kh. Mohd. Sultan, President Baramula-Sopore Bus Stand, Srinagar.
68. Sh. Ghulam Qadir Regu s/o Ahsan Joo r/o Khawaja Mir Ali, Anantnag.
69. Pt. Janki Nath Kantru s/o Pt. Shiv Ji Kantroo r/o Anantnag.
70. Sh. Ghulam Nabi Para s/o Mohd. Sultan Para, Karafali Mohalla, Srinagar.
71. Sh. Ghulam Qadir s/o Nur Mohd. r/o Sona Masjid, Srinagar.
72. Sh. Abdul Rehman Nanda s/o Abdul Ghaffar Nanda, r/o Abi Gujar, Srinagar.
73. Sh. Ghulam Ahmad s/o Ghulam Mohd. Darzi r/o Abi Guzar, Srinagar.
74. Sh. Mohd. Ganai s/o Ramzan Ganai r/o Chawqund, Anantnag.
75. Sh. Dina Nath, Retd. H. C. Kashmir Police r/o Nar Paristan, Srinagar.
76. Pir Mohd. Yahia, M. L. A., Srinagar.
77. Sh. Ghulam Rasool, Lambardar, Kulgam.
78. Sh. Mohd. Butt, Chowkidar, Kulgam.
79. Raja Asghar Ali Khan, S. I., Srinagar.
80. Sh. Jiwan Nath, Section Officer, C. I. D., Srinagar.
81. Sh. Zanardon, Sub-Inspector, Srinagar.
82. Sh. G. N. Khan, Sub-Inspector, C. I. A., Srinagar.
83. Sh. Ghulam Mohiuddin, Section officer, C. I. D., Srinagar.
84. Sh. Premnath Kaul, Sub-Inspector, C. I. A., Srinagar.
85. Sh. Ghulam Rasool Sheikh, Sarpanch Halqa Dolipura, Tulawari, Tehsil Handwara.
86. Sh. Shiv Nath, Sub-Inspector, Srinagar.

87. Sh. G. M. Fazil, Inspector, C. I. D., Srinagar.
88. Sh. Onkar Nath, Record-keeper, C. I. D., Srinagar.
89. Sh. Ghulam Qadir s/o Subhan Joo r/o Mohalla Gurgadi, Srinagar.
90. Sh. Ghulam Nabi Gaddu s/o Ghulam Mohd. Gaddu, Sahyar, Srinagar.
91. Kh. Mohd. Sultan, S. P., Anantaag.
92. Sh. Ghulam Mohd. Reshi s/o Ghulam Ahmad Reshi r/o Anantnag.
93. Sh. Ghulam Mohd. Dalal s/o Ahad Joo Dalal r/o Malakhnag, Anantnag.
94. Sub-Inspector Sh. Kanth, Anantnag, now S. H. O. Sadar, Srinagar.
95. Sh. Ghulam Ahmad Darzi s/o Mohd. Jabbar r/o Mohalla Hazratbal, Anantnag.
96. Sh. Aziz Malik s/o Qadir Malik r/o Sarnal, Anantnag.
97. Sh. Ghulam Ahmad Baktu r/o Dalgate, Srinagar.
98. Sh. Abdul Rehman Kotwal s/o Noor Mohd. r/o Lal Mandi, Srinagar.
99. Sh. Mohd. Yusuf Kakru s/o Amir Joo Kakru r/o Qazi Hamam, Baramula.
100. A. S. I. Gopi Nath, Police Lines, Srinagar.
101. Sh. Mohd. Sidiq Sheikh s/o Abdul Rahim Sheikh, Mohalla Qazi Hamam, Baramula.
102. Sh. Wali Ganai, Lambardar, Kausa, P. S. Pattan, Baramula.
103. H. C. 459 Niranjan Nath, C. I. A., Srinagar.
104. H. C. No. 524 Sh. Harbans Rai, Police Lines, Ferozpur.
105. H. C. 185 Sh. Santokh Singh, Policc Lines, Gurdaspur.
106. A. S. I. Sardar Jaswant Singh, P. S. Pathankot.
107. Sh. Sayyad Kustaffa s/o Sayyad Sadiq r/o Nawpura, Srinagar.
108. H. C. 467 Sardar Tara Singh, Moharir, P. S. Sadar, Gurdaspur.
109. Orderly A. S. I. Police office Gurdaspur with record regarding appointments and postings of F.C. Tajuddin. (Later promoted A. S. I. with range No. 111/c).
110. Sh. Yog Raj, Police Inspector, Civil Lines, Amritsar.

111. Sh. Des Raj H. C. No. 34, Vernacular Rocord-keeper, S. S. P. Office, Amritsar.
112. Sh. Pearey Lal, Orderly A. S. I. No. 414, Distt. Police, Amritsar.
113. Orderly A. S. I., S. S. P's. Office, Amritsar, along with long roll of Malik Khan Mohd. Khan, Distt. Inspt., Amritsar, in the year 1941.
114. Sh. Ram Prakash, S. I. No. 23/B, Security Staff, Amritsar.
115. Sh. Faqir Chand, A. S. I. No. 972/A, Security A. S. I. Abhor, Distt. Ferozpur.
116. Sardar Darshan Singh, Confidential Clerk, office of the S. S. P., Ferozpur.
117. Sh. Lassa Khan s/o Amir Khan r/o Rajpura Thanda Kasi, Tehsil Baramula.
118. Sh. Abdul Salam Sheikh s/o Mohd. Iqbal Sheikh r/o Fateh Kadal, Srinagar.
119. Pir Saifuddin Makhdoomi, Tehsil President, National Conference, Srinagar.
120. Sh. Bashir Ahmed s/o Mohd. Ramzan r/o Doda.
121. Sh. Mohd. Sadiq Nausheri s/o Ghulam Ahmed Nausheri r/o Gurgadi Mohalla, Srinagar.
122. Lt. Abdul Aziz Khan s/o Haji Ghulam Ahmad Khan r/o Seral Bala, Srinagar.
123. Sh. Kalandar Joo s/o Akbar Joo r/o Badian, Bonyar, Tehsil Uri.
124. Sh. Janki Nath Constable No. 906, Moharir Constable Police, Rampur.
125. H. C. Lachman Kaul No. 1227, C. I. A., Srinagar.
126. Sh. Jumma s/o Nura Chera r/o Banali, Tehsil. Uri.
127. Sh. Mohmda Chakar, Chowkidar, Tri Kanjan, Uri.
128. Sh. Nazir Ahmed Khan s/o Ghulam Hassan Khan r/o Bela Slamabad, Bonyar, Uri.
129. Sh. Rajwali s/o Mamdin r/o Salasan, Uri.
130. Sh. Sayyed Abdul Rashid Shah s/o Hassan Shah r/o Said Pura, Tehsil Uri.
131. Sh. Sonna Butt Alias Sanaullah Butt s/o Ghaffar Butt r/o Botengu, Sopore.

132. H. C. Sh. Bansi Lal No. 420, C. I. A., Srinagar.
133. Pandit Krishen Joo Dar, Ex-Director Food Control r/o Safa Kadal, Srinagar.
134. Sh. Shambhu Nath Kaul, Head Clerk, office of the Director Food Control, Srinagar.
135. Kh. Aziz Jan, Ex-Registrar Co-operative r/o Safa Kadal, Srinagar.
136. Sh. Ghulam Ahmad Butt s/o Kh. Omar Butt r/o Chandapura, Habba Kadal, Srinagar.
137. Kh. Saif-ud-din, D. I. G. Police, Jammu.
138. Sh. Lambooder Tikkoo, S. I. Police, P. T. S., Srinagar.
139. Sh. Ghulam Hussain Makhdoomi s/o Pir Wali Shah r/o Mauza Kalam Chakla, Handwara.
140. Pt. Prem Nath Misri s/o Pt. Sansar Chand, Office Supdt. of the office of the Director Food Control, Kashmir, Srinagar.
141. Sh. Abdul Ahad Kachru s/o Habib Ullah of Kanakadal, Srinagar. (Record-keeper of the D. F. C., Kashmir, Srinagar.)
142. Sh. Janke Nath Fotedar, Office Supdt., Animal Husbandry, Srinagar.
143. Sh. Abdul Rashid Kamli, Office Secry., Central National Conference, Srinagar.
144. Sh. Nath Ji, H. C. No. 1379, Police Lines, Srinagar.
145. Sh. Mohd. Mir s/o Ghaffar Mir r/o Nihalpura, Pattan.
146. Sh. Mohd. Hussain Shah s/o Mohd. Shah r/o Usan Khui Tehsil, Sopore.
147. Sh. Prithvi Nath, H.C. No. 657, Police Lines, Srinagar.
148. Pt. Janki Nath Kakroo s/o Pt. Srikanth Kakroo r/o Achhabal, Tehsil Anantnag.
149. Sh. Gul Shah s/o Maulvi Aziz Ullah r/o Shopian.
150. Sh. Abdul Ghaffar Kuchhay s/o Habib Kuchhay r/o Humahama, Tehsil Badgam.
151. Sh. Mir Ghulam Hassan Gilani s/o Mir Hassan Shah r/o Khanyar, Srinagar.
152. Sh. Abdul Ghani Lulu s/o Munawar Joo Lulu r/o Qadipura, Anantnag.
153. Sh. Abdul Ghani Najar s/o Abdul Aziz Najar r/o Karala

Teng, Anantnag.

154. Munshi Ghulam Hassan Kadu s/o Ghulam Qadir Kadu r/o Anantnag.
155. Sh. Abdul Rashid Soofi s/o Amir Joo Soofi r/o Malakhang, Anantnag.
156. Sh. Ghulam Ahmad Mir s/o Abdul Rehman Mir r/o Mohalla Sarak, Anantnag.
157. Sh. Kaushi Nath s/o Pt. Sona Kaul r/o Mohalla Mattu, Anantnag; Clerk D.C's Office, Anantnag.
158. Mr. R. L. Nagpal, Home Secy., J. & K. Govt., Srinagar.
159. Sh. Ghulam Mohd. Mir s/o Abdul Khaliq Mir r/o Chak Ashmuji, Tehsil Kulgam.
160. Sh. Ali Mohd. Dar s/o Rasuldar r/o Ashumji, Tehsil Kulgam.
161. Sh. Ghulam Rasool Khande s/o Ali Khande r/o Sopur, Tehsil Kulgam.
162. Sh. Mohd. Abdulla Rathar s/o Ghaffar Rathar r/o Ashumji, Tehsil Kulgam.
163. Sh. Ghulam Ahsan Dar s/o Ghulam Rasool Dar r/o Bogund, Tehsil Kulgam.
164. Sh. Abdul Rehman Dar s/o Abdul Ahad Dar r/o Sopur, Kulgam.
165. Bakshi Basant Rai s/o Bakshi Hakumat Rai, Rtd. Zaildar (Irrigation), Jammu.
166. Th. Raj Singh s/o Th. Kashmir Singh, Ahlmad Khatuni, to the Divisional Engr. (Irrigation), Jammu.
167. Sh. Abdul Hamid Sheikh s/o Lala Sheikh r/o Chak Doda Bagh, Nilasar, Tehsil Baramula.
168. Sh. Abdul Majid Mir s/o Ghulam Ahmad Mir r/o Poompura Basant Bagh, Srinagar.
169. Sh. Samad Naik s/o Sidiq Naik r/o Ferozpura, Tangmarg.
170. Sh. Abdul Ahad Butt s/o Ghulam Rasool Butt r/o Theed, Tehsil Srinagar.
171. Sh. Gurbux Rai Verma, Ex-Manager, Grant Hotel c/o Imperial Hotel, Amritsar.
172. Sh. Dwarka Nath, Secretary General Dept., J & K State, Srinagar.

173. Sh. Ghulam Mustafa s/o Ghulam Hassan, Accountant, Multi-purpose, Co-operative Society Ltd., Kurigam, (Qazigund).
174. Reader to Sh. T.N. Mattu, Special Magistrate (A.D.M.) Srinagar, with the judicial file of the case being tried under the Enemy Agent Ordinance *Vs.* Mohiuddin Zargar, and of the case against Gh. Hassan Kanth.
175. Judicial Record-keeper, Jammu, with the judicial file of the case against Bagh Ali and Ismail.
176. H. C. Shambhu Nath, P. S. Shopian, Distt. Anantnag (Rtd.) r/o village Drussu, P.S. Pulwama.
177. Pt. Mohanand Joo, S.I. Shopian, now S.H.O., Uri.
178. Nk. Gian Singh, J. & K. 11th Militia, Kashmir.
179. A. S. I. Habibullah, P. S. Kupwara, Distt. Baramula.
180. Sh. Ghulam Mohd., S.H.O., P.S. Kupwara (on 26-7-1957).
181. Kh. Ghulam Rasool, S. H. O., P. S. Kulwama, Distt. Anantnag.
182. Sh. Badri Nath Kotroo, S.H.O., Badgam now R.I. Police Lines, Srinagar.
183. H. C. Rughnath, P. S. Badgam.
184. H. C. Abdul Ahad No. 474, P.S. Baramula.
185. Mr. Mohd. Ismail Paul, S. H. O., Baramula.
186. Sh. Ghaffar Illahi s/o Wali Illahi r/o Gampura Badgam, P. S. Sadar, Srinagar.
187. M.H.C. Ghulam Mohd., P.S. Sadar, Srinagar, No. 973.
188. Mirza Qamar Din, Circle Inspector Sadar, Srinagar Circle, Srinagar.
189. Pt. Amar Nath Bhan, S. H. O., P.S. Shergarhi.
190. Pt. Janki Nath, Tehsildar, Uri.
191. H. C. Arjan Nath, P.S. Uri, since transferred to Jammu.
192. H. C. Jaswant Singh, P. S. Uri; *(kare-khas)*.
193. H. C. Mohd. Afzal Khan, P. S. Uri.
194. Mr. Dewan Chand Sethi, S. H. O., P.S. City Jammu.
195. A. S. I. Th. Gauri Singh, P.S. Pacca Danga, Jammu City.
196. Mr. Dhan Raj Inspector, P. S. City Jammu.
197. L/NK (G.T. 682) Des Raj s/o Ditto Brahmin of Nauabad, P. S. Sadar Jammu.

198. Sh. Parshotam Lal s/o Chet Ram of Bhata Kas, P. S. Mendhar.
199. M.H.C. Barkat Ram, P.S. Naushera, Distt. Poonch.
200. M.H.C. Narinder Singh, P.S. Mender.
201. S. Saldev Singh s/o Anant Singh Shopkeeper of Dharamsala, Mendhar, Distt. Poonch.
202. Sh. Nandlal s/o Atma Ram of Sakhi Maidan, P. S. Mendhar, Distt. Poonch.
203. H. C. Dhani Ram, P.S. Mendhar, Distt. Poonch; No.442.
204. Sh. Diwan Chand s/o Ramdayal r/o Gangrot, P. S. Naushera, Distt. Poonch.
205. Sh. Sant Ram, Lambardar of AMB., P.S. Kahnachak.
206. Sh. Ghulam Mustafe s/o Ghulam Hassan, Accountant, Multi-purpose Society, Kurrigam, Qazigund.
207. Sh. Hirday Nath, Confidential Clerk, Office of S. P. Baramula.
208. Sh. Piare Lal Karihalu, Org. Labour Union, Srinagar.
209. Sh. Ghani Baba s/o Ahmad Baba c/o Hind Kashmir Hotel, Lal Chauk, Srinagar r/o Banakot, Bandipur.
210. Sh. Nawab Khan s/o Ahmad Khan r/o Lari Dora, Baramula c/o Hind Kashmir Hotel.
211. Mr. Habibullah, Assistt. News Editor, Radio Kashmir, Srinagar.
212. Sh. Kidar Nath Sharma, Staff Artist, Radio Kashmir.
213. Pt. Dina Nath Raina, Headmaster, National High School, Srinagar.
214. Sh. Moh'd Shafi Khan s/o Mistri Kabir Khan r/o Shalakadal, Srinagar.
215. Sh. Hafizullah s/o Habibullah r/o Shergarhi, Srinagar.
216. Sh. Khizar Moh'd s/o Ghulam Nabi r/o Gao Kadal, Prop. Mattan Photo House, Srinagar.
217. Sh. Abdul Khaliq Gilkar s/o Ghulam Ahmad Gilkar r/o Sathu Pain.
218. Pt. Nandlall, S. I., P. S. Sadar, Shergarhi, now C. I. A., Srinagar.
219. Hakim Qamarudin, S. I., P. S. Sadar, Srinagar; now Inspector, Shopian.
220. Sh. Ghulam Moh'd Mir, M.I.C., Srinagar.

221. Mr. M. H. Kamili, Ex-Home Secretary, Srinagar.
222. Capt. Rajinder Singh, No. 2 MOB, Amu, Repair Section c/o 56 APO, New Delhi.
223. Sh. Puran Mal, S.H.O., P.S. Sadar, Jammu.
224. Sh. Satish Chander, P.S. Chamb, Jammu.
225. Sh. Jagdish Singh, S.H.O., Noshera, Distt. Poonch.
226. Sh. Chuni Lal, S.H.O., P.S. Kahna Chak.
227. Sh. Mohd. Kabir s/o Ahmad Din of Sakhi Maidan, P.S. Mendhar.
228. Capt. Barsat Singh, B.O.C. 80 Brigade c/o 56 A.P.O., New Delhi.
229. Block Development Officer, Chamb, Jammu.
230. Maj. Dwarka Dass, B.M. 193, Inf. Bde. c/o 56 A.P.O., New Delhi.
231. H.C. Dhani Ram No. 442., P.S. Poonch.
232. Th. Ajit Singh, Distt. Inspector of Police, Poonch.
233. Mr. Bassar Khan, S.H.O., P.S. Mandi.
234. S. Kirpal Singh s/o S. Ram Singh, Mukhtiar-e-am, Gurdwara Nigari Sahib, S.I., Poonch.
235. S. Jagdish Singh S.I., Poonch.
236. Sh. Yog Raj s/o Kirpa Ram Shopkeeper of Sarola, P.S. Rajauri.
237. Sh. Mohd. Taj Khan, A.S.I., P.S. Rajauri.
238. Sh. B. Lalman, S.I., S.H.O., Rajauri.
239. H. C. Chuni Lal No. 551, P.S. Chamb, Jammu.
240. S. Baldev Singh, S.I. Special Staff, Jammu.
241. H.C. Chaman Lal, P.S. Mendhar, No. 118.
242. Bakshi Amar Nath Inspector, C.I.A., Jammu.
243. Sh. Mool Raj Chowkidar, P.S. Naushera.
244. Th. Anant Singh, A.S.P., Rajauri, Distt. Poonch.
245. S. Arjan Singh, B.T.O., 80 Bde. c/o 56 A.P.O., New Delhi.
246. Sh. Bishan Dass, Astt. Electric Engr., Hira Nagar.
247. H. C. Yograj, P.S. Hira Nagar.
248. Sh. Amar Nath, S.I., P.S. Hira Nagar.
249. Sh. Ram Singh s/o Punoo Ram of Gehar, P.S. Hira Nagar.
250. B. M. of No. 93 Inf. Bde. who was posted as such in

April 1958 (1-4-58) c/o 56 A.P.O., New Delhi.

251. H. C. Moti Ram, P.S. Poonch.
252. H. C. Ganga Ram, P.S. Poonch.
253. Sh. Manohar Lal, A.S.I., Police Division Satwari, P.S. Sadar, Jammu.
254. S. Chatar Singh s/o S. Hari Singh, Ward No. 3, Mohalla Seraj, Poonch.
255. Mohd. Yahiya Siddiqi, President Central Labour Union, Srinagar.
256. Sh. S. N. Lahri, Deputy Chief Inspector of Explosives, Delhi.
257. Sh. S. N. Sen, Govt. Examiner of Questioned Documents, Railway Board Building, Simla-3.
258. Sh. Rajender Prasad Singh, Asistt. Govt. Examiner of Questioned Documents, Railway Board Building, Simla-3.
259. Pt. Amar Nath s/o Mangoo Ram of Mohalla Rehari, Jammu, Head Warder, Central Jail, Jammu.
260. Sh. Prabh Dayal s/o Brij Lal, Camp and Establishment Clerk, office of Dpty. Excise and Taxation Commissioner, Jammu.
261. Sh. Bashir Ahmad Khan s/o Fateh Mohd. Khan of Khudpura, Tehsil Baramula.
262. S. Dayal Singh, Superintendent, Sub-Jail, Kud.
263. Sh. Dilawar Beg, Chowkidar, Hardoona, Tehsil Handwara.
264. Pt. Ram Chand Handoo, S.I., C.I.A., Srinagar.
265. Sheikh Ghulam Qadir, I.P.S., S.P., C.I.A., Srinagar.
266. Sardar Shanker Singh, Head Warder, Central Jail, Jammu.
267. Sh. Ali Mohd. Khokhar s/o Sayeed Mohd. Lambardar of Balkot, Tehsil Uri.
268. Sh. Ghulam Shah s/o Mohd. Shah r/o Maisuma, Srinagar; Driver, Car No. J & K 4027.
269. Sh. Ghulam Rasul Magre s/o Mohd. Ismail Magre r/o Lazbal, Anantnag.
270. Sh. Faqir Mohd. Khan s/o Sher Mohd. Khan r/o Rajpura, Badgam; now Chandusa, Tehsil Baramula.
271. Kotwal Krishen Lal, Head Warder, Sub-Jail, Udhampur.
272. Sh. Mohd. Akbar, M.L.A. r/o Ferozpura, Tangmarg.
273. Sh. Mohd. Abdulla Ganai s/o Mohd. Subhan r/o Kausa (Magam), P.S. Pattan.
274. Maharaj Krishna s/o Sh. Krishen r/o Poonch. Clerk, Kud Sub-Jail, with the cash book of the Kud Jail.
275. H. C Hari Chand No. 1335, C.I.A., Srinagar.
276. Sh. Mohd. Yusuf s/o Maqbool Shah of Khanqah Maula, Srinagar.
277. Sh. Ghulam Hassan Khan s/o Ghulam Nabi Khan of Khanqah Maula, Srinagar.
278. Sh. Mir Mohd. s/o Hasso r/o Hichamargi, P. S. Vilgam, Tehsil Handwara.
279. Sh. Mohd. Abdullah s/o Abdul Azix of Mohalla Shah Sahib, Anantnag.
280. Sh. Ama Malik s/o Subhan Malik, Lambardar, Sarnal, Anantnag.
281. Sh. Ghulam Ahmad Bachhoo s/o Abdullah Joo r/o Anantnag.
282. Sh. Ghulam Nabi Baba s/o Munshi Abdullah Baba r/o Hazratbal, Anantnag.
283. Sh. Ali Mohd. s/o Noor Din r/o Chhatabal, Srinagar.
284. Sh. T. N. Mattoo, A. D. M., Srinagar.
285. Malik Sharif Din, M. I. C., Srinagar.
286. Sh. Mohd. Din s/o Mani r/o Choranda, Tehsil Uri.
287. Sh. Nizamuddin Shawl s/o Ghulam Jillani Shawl r/o Khanyar, Srinagar.
288. Sh. Ghulam Mohd. Tanga s/o Mohiuddin Tanga r/o Khanpora, Baramulla.
289. S. Sayeed Shah, Tourist Reception Centre, Srinagar.
290. Sh. Mohd. Yasin Dar s/o Kamal Dar r/o Bulbul Lankar, Srinagar.
291. Reader to the S. M. Sh. N. K. Ganjoo with the file of the Hazaratbal Murder Case.
292. Permit Officer, Srinagar, with the applications for and the counterfoils of permits issued to Ghulam Mohd. Chikken, Pir Mohd. Afzal Shah Makhdoomi, Kh.

Mohd. Amin etc. during particularly in January and September 1956.

293. Officer-in-charge Lakhanpur Check-post with the record regarding the accused having crossed and returned through the post.

294. Permit Officer Jammu, with the applications and the counterfoils of the permits issued to the various accused.

295. Police officer-in-charge Raja Sansi (Amritsar) Airport Check Post with the record of January, 1956, regarding the persons arriving from the J & K State.

296. Police officer-in-charge Wagha Border Police Check-post with the record of the persons crossing to Pakistan of Haji Mohd. Ishaq, Ghulam Mohd. Chikken etc. and their return in January 1956.

297. Sh. Ram Murti s/o Pt. Sant Ram Brahmin r/o Dhakki Jammu.

298. Sh. Kalu Broker of Mehangi Lambardar, of Ghuranda, Uri.

299. Pir Mohd. Maqbool Sheikh, Vakil of Khanpur, Baramula.

300. Sh. Sitar Ali s/o Manta Gangai of Kamalkot, Tehsil Uri.

301. I. A. C. Station-in-charge Srinagar, with the passenger list of January 1956 and September 1956 of the passers who left by air for Amritsar and Delhi and the passengers' list of the passengers who arrived at Srinagar by air on 20-10-56.

302. Sh. Hashim Ali s/o Sitar Ali Gangial of Kamalkot, Tehsil Uri.

303. Pt. Nathji Kaul s/o Pt. Lachhman Kaul r/o Shala Kadal, Srinagar. Tax Inspector, Muncipal Council, Srinagar.

In the Court of Special Magistrate, Kud.

In Re:

STATE *Versus* MIRZA MOHD. AFZAL BEG AND OTHERS.

Application to reject the provisional list of witnesses and to discharge the accused.

On behalf of the accused in the above case, it is submitted as follow:—

The Prosecution has so far defied the direction of the Court to file a list of witnesses and all the documents.

2. On the last hearing the Prosecution has filed what is called a provisional list of witnesses.

3. It is submitted that there is no provision of law under which the Provisional List of Witnesses can be filed by the Prosecution.

4. That, further, even the Provisional List of Witnesses does not give the full and correct addresses, names and whereabouts of the witnesses, in order that the defence may not know who the witnesses are.

5. That the action of the Prosecution tantamounts to a denial of a fair trial to the accused.

6. That in view of the failure of the Prosecution to comply with the mandatory provisions of law, without any extenuating circumstances under which the Prosecution can claim an adjourment, this hon'ble Court may be pleased to hold that the complaint is only made for ulterior purposes and with a view to harass the accused without any evidence worth mentioning.

PRAYER : It is therefore prayed that the accused be discharged forthwith.

Sd. 1. MOHD. LATIF,
2. AMAR SINGH,
3. G. NABI.

Kud : Dated 9-7-58.

In the court of Mr. N. K, HAK, M.A., LL.B.,
Special Magistrate, Magistrate Ist Class, Jammu & Kashmir
KUD.

Criminal File No. 1 of 1958.
Date of Institution—21-5-58.
Date of Decision—Pending.

STATE *Versus* MIRZA MOHD. AFZAL BEG AND OTHERS.

Offence U/S 121-A, R.P.C., 120-B, R.P.C. Read with Rule 32 of J & K Security Rules and the Said Rule.

Application to reject the provisional list of witnesses and to discharge the accused.

Present :—

Mr. Mitter, M/s. Kaul, and Mengi, P. I. for Prosecution.

Accused Nos:— 1,3,4.5,6,7,8,9,13,14,15,16,17 & 20 with their Counsel.

ORDER.

Prosecution has filed provisional list of witnesses and this is an application on behalf of the accused to reject the Provisional list of witnesses and to discharge the accused.

The grounds urged are :—

1. That Prosecution has so far, inspite of directions, not filed list of witnesses and all the documents.

2. That there is no provision of Law under which provisional list of witnesses can be filed by the prosecution.

3. That the provisional list does not give full and correct addresses, names and whereabouts of the witnesses.

4. That the action of prosecution tantamounts to a denial of a fair trial to the accused and it has, therefore, been prayed that the accused be discharged forthwith.

Mr. Mani who moved this application on behalf of the accused has submitted that there is no provision of law which allows provisional list of witnesses and the list does not contain the names of the witnesses and their whereabouts and it is necessary that the list of witnesses and documents should be in the court so that the witnesses can be cross-examined and summons issued to them. It is also necessary for the fair trial of the accused that the complete list of prosecution witnesses should be filed. Inspite of so many hearings prosecution has not filed complete list of prosecution witnesses and documents.

Mr. Mitter, senior counsel for Prosecution has submitted that there is no provision of law which compels them to furnish the addresses of witnesses. The prosecution has only to furnish the names of the witnesses and these are already on the file. This is a case triable by the Court of Sessions. Accused can have plenty of time to find out their addresses and the law does not require prosecution to give their addresses. The defence is not entitled to documents at this stage, When prosecution proves a document in the court, then the accused are entitled to examine it. The names of the witnesses have been given for the convenience of the court but it is not possible to give their full addresses as he fears that the evidence may be tampered with. He has submitted that the application may be rejected.

This is an inquiry in the case which is triable by the Court of Sessions. Section 208 Clause (1) reads :—

"The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the magistrate".

Mr. Mitter has argued that this section contemplates the production of evidence by the prosecution in support of its case and it nowhere lays down that the prosecution can be called to file the whereabouts of witnesses. His argument is that in view of the apprehension that the evidence may be tampered with in this case, it is not possible for the prosecution to furnish full addresses of the witnesses at this stage and that when the

witnesses appear their full particulars are sure to become known to the accused who will be at liberty to cross-examine them when they appear on behalf of the prosecution.

Mr. Mani has not been able to show any provision of law under which prosecution can be compelled to file list and whereabouts of witnesses and documents along with the complaint. In Rules and Orders (Criminal) for the guidance of courts subordinate to High Court (General Criminal Rules) Chapter XVI under Head (III) trials by Magistrate para 38 procedure in warrant cases we find the following :—

"When the accused appears or is brought before the court the Magistrate must at once proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. The Magistrate is further required to ascertain from the complainant otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution....."

In this only names of such persons have been mentioned and one does not find words, list or whereabouts etc. of such persons.

In this case prosecution has filed provisional list of prospective witnesses with prayer for leave to furnish a further list of witnesses. I have gone through that list and I find that though names of witnesses are stated therein, in some cases names given are too brief to clearly give any indication with respect to these persons. Prosecution is, therefore, directed to furnish names of all the witnesses cited therein clearly.

So far as the question of documents is concerned it has been argued on behalf of prosecution that distinction has to be made with respect to filing of documents in civil and criminal cases and that it is not incumbent upon the prosecution to file documents along with the complaint and that prosecution will produce the required documents at the proper stage and when they produce and prove these the defence will be entitled to examine them. I see force in this contention on behalf of prosecution. The defence shall of course have to be afforded reasonable facilities to examine documents when produced and

proved on behalf of prosecution.

Mr. Mani has not been able to cite any law under which the accused can be discharged at this stage simply because prosecution has not so far filed complete and final list of witnesses and has only filed provisional list of prospective witnesses and has also not filed all the documents.

Section 208 (1), Cr. P. C., contemplates hearing of complainant and taking of all such evidence as may be produced in support of prosecution etc. when the accused appears or is brought before the court and in this case all the accused have not so far been served and have not appeared. The word accused used in this section can only mean all the accused in the case.

For the foregoing reasons the prayer asked for in this application cannot be granted and this application is, therefore, rejected.

(Sd.) N. K. HAK,
Special Magistrate,
Magistrate Ist Class,
Jammu and Kashmir (Kud).

Announced : 24-7-58.

List of Witnesses.

1. A. S. I. Pt. Jia Nath, C. I. A., Srinagar, regarding Pir Mohd. Maqbool Gelani's search at Delhi and Bombay.

2. H. C. Shambhu Nath No. 225, C. I. A., Srinagar, regarding search of S. I. Karamat Hussain.

3. H. C. Bansi Lal No. 420, C. I. A., Srinagar, regarding the search of Asghar Ali Shah etc.

4. H. C. Kashi Nath No. 612, C. I. A., Srinagar, regarding the search of Mehrajuddin, Mir Maqbool Gillani etc.

Presented by Mr. Mitter,
Counsel for the Prosecution:
File.
Sd. N. K. HAK,
Special Magistrate.
24-10-58.

In the court of Special Magistrate, Jammu & Kashmir, (now sitting at Jammu).

In the matter of a complaint against Sheikh Mohd. Abdullah and others, under Section 121-A of the Ranbir Penal Code.

[Presented by Mr. Mitter. File. Sd. N. K. Hak, Sp. Mag.]

The humble petition of D. W. Mehra most respectfully sheweth :—

(1) That your petitioner is the Inspector-General of Police of the State of Jammu and Kashmir.

(2) That on the 21st of May 1958 your petitioner filed a complaint before Sh. N. K. Hak, Special Magistrate, Jammu and Kashmir, against Mirza Mohd. Afzal Beg and 24 others for offences punishable under section 121-A of the Ranbir Penal Code, read with Rule 32 of J & K Security Rules, 1996.

(3) That your petitioner is advised that it is not obligatory on the prosecution to supply a list of prosecution witnesses under the law. In deference to the wishes and direction of the court your petitioner furnished on the 24th of October 1958 a complete list of witnesses with their addresses and full particulars concerning them.

(4) That earlier in course of these proceedings at Kud the senior counsel for the State declined to furnish a list of witnesses prematurely as he apprehended that the witnesses may be tampered with.

(5) That soon after the list of witnesses was filed in court, a copy supplied to the defence on the 24th of October 1958 the recipient (accused) of the list got over 100 copies of the same cyclostyled and distributed the same in the Valley with instruction to their followers to approach the witnesses and warn them of the consequences of giving evidence against them. Some of the witnesses have further been told that there is no risk if they resile from the statements made to the police. Annexed herewith is a copy of the cyclostyled list which is being circulated by the accused.

(6) That your petitioner is further informed that some of the accused in the Hazrat Bal Case who are out on bail have been approaching different witnesses for the purpose of persuading them to resile from their statements.

(7) That if the accused are allowed to pursue this method of tampering with witnesses the prosecution will be seriously prejudiced.

(8) In the premises your petitioner prays that your honour may be pleased to direct the accused not to pursue this course of action.

Your petitioner shall, as in duty bound, ever pray.

Sd. D. W. MEHRA,
Inspector-General of Police,
Jammu & Kashmir Govt.
Petitioner.

In the Court of Mr. N. K. Hak, M.A., LL.B.
Special Magistrate, Magistrate Ist class, Jammu & Kashmir.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS, AND SHEIKH MOHD. ABDULLAh.

U/s 121-A, R.P.C. etc.

Petition of Shri D. W. Mehra, I.G.P., Jammu and Kashmir Govt. dated 12th November 1958.

Present :—

Counsel for the parties and
Accused in person.

ORDER.

Mr. Beg made his submission with respect to this petition. He denied these allegations. In case these allegations are correct then the accused are directed not to pursue this course of action and if these allegations are not correct then no direction is called for.

Nevertheless, all the concerned are, however, directed to desist from any such action and assist the court in arriving at a just decision and conclusion in the case.

Announced.
28-11-1958.

Sd. N. K. Hak,
Special Magistrate,
Jammu and Kashmir, Jammu.

In the Court of Special Magistrate, Jammu.

STATE *Versus* MIRZA MOHD. AFZAL BEG AND OTHERS.

Re.....

Prosecution Witnesses.

Petitioners sheweth :—

1. That the Inspector-General of Police, Jammu and Kashmir State, who has lodged this prosecution against the petitioners, put in an application on 12th November 1958 alleging that prosecution witnesses were being persuaded to resile from the statements made by them to the police.

2. That this and similar other allegations made in the said application are baseless, false and frivolous mainly intended to harass the accused and to find an excuse to further victimize the accused and their relatives, friends or "followers."

3. That the prosecution having unduly delayed the production of the list of witnesses for nearly four and half months are now creating fresh excuses for further delay in order to cause additional hardship to the accused.

4. That prosecution actually have no witnesses able to testify according to law to the false allegations that they have made against the accused.

5. That even after years of preparation and tutoring of witnesses and the like, the prosecution do not still feel sure about their evidence and witnesses, and are, therefore, making baseless allegations as those in the said application, simply to justify further changes in the list of witnesses.

6. That the accused have grave apprehension of such changes being again made and even fictitious witnesses being finally put up in the witness box.

7. That these apprehensions find support from the general behaviour of the prosecution and the general conduct of the prosecuting agency during the previous years.

8. That this has seriously prejudiced the accused so far and, in addition to repression and victimization, will gravely

further prejudice the accused and their defence.

9. That the accused pray that :—

(a) The said application of the Inspector-General of Police be rejected.

(b) The prosecution be bound to stick to the list that they have produced on 24th October 1958, and

(c) Prosecution be directed to desist from the practice indicated in the above paras.

Sd. Mirza Mohd. Afzal Beg and others (accused).

Sd. 1. Mohi-ud-din Zargar.
2. Soofi Mohd. Akbar.
3. Ali Shah.
4. Mir Mohd. Nazir.
5. Pir Afzal.
6. Pir Abdul Gani.
7. G. K. Beg.
8. Ghulam Mohi-ud-din Hamdani.
9. Mir Ghulam Rasul.
10. Ghulam Mohd. Chikken.
11. Pir Mohd. Maqbool.
12. Mohi-ud-din Shah.
13. M. M. Amin.

Dated 28-11-58.
Special Jail, Jammu.

[Presented by M. A. Beg, accused. File. Sd. N. K. Hak, Sp. Magistrate.]

In the Court of Special Magistrate, Jammu.

STATE *Versus* MIRZA MOHD. AFZAL BEG AND OTHERS.

[Presented by Mr. Zargar. File. Sd. N. K. Hak, S. M.]

Re.....

"Further list of prosecution witnesses".

The applicants submit on behalf of the defence as under :—

On 26-6-59 the learned public prosecutor submitted a further list of witnesses whom the prosecution desire to examine in the case. The defence object to this and request that this list be rejected on the following grounds amongst others :—

1. Ever since the institution of the case the prosecution

have tried not to disclose the list of witnesses they intend to produce in this case. Thus after the instance of the accused and orders of the court on 11-6-58, the prosecution produced a list of about 81 witnesses without giving parentage, residence or official designation and even in some cases without stating the full name of the witness. The defence was completely at a loss even to find out the identity of a single witness from this list. On being pointed out to the court, the prosecution were directed then to be precise in giving the description of the witnesses.

This was the first attempt by the prosecution to defeat the purpose of law and deny the conditions of a fair trial to the accused. Perusal of that list dated nil will amply bear this out.

2. The defence continued to make strenuous efforts, through Court, to persuade the prosecution to produce the list of witnesses, with precise particulars so as to ensure right of the accused to find out the antecedents and history of the witnesses for their cross-examination. Unfortunately the prosecution unduly delayed the compliance for nearly 4 1/2 months for production of such a list and it was as late as 24-10-1958 that they produced the necessary list.

3. Soon after the production of the said list on 12-11-58 the prosecution submitted an application alleging that the accused were tampering with the prosecution witnesses. This seemed to be calculated to create a basis for further alteration in the list of witnesses.

4. The accused refuted the said allegation of tampering with the witnesses, and in their application dated 28-11-1958 detailed out the reasons for their contention and exposed the ill-conceived scheme of the prosecution. Attention is respectfully invited to that application and in particular to its paras V and VI which read as under :—

> "V. That even after years of preparation and tutoring of witnesses and the like the prosecution did not still feel sure about their evidence and witnesses,

> and are, therefore, making baseless allegations as those in the said application simply to justify further changes in the list of witnesses.
>
> "VI. That the accused have grave apprehensions of such changes being again made and even fictitious witnesses being finally put up in witness box."

The accused in that petition had prayed, among the other things :—

> "The prosecution be bound to stick to the list (of witnesses) that they have produced on 24th October 1958."

5. It will be highly prejudicial to the defence if the prosecution are allowed to make additions and alterations in the list of witnesses according to their free choice and at their sweet will. Such practice would render absolutely futile submission of any list at all.

6. In a case like this where the accused have been in prison for years and where the inquiry is being held about 200 miles away from their residence, the object of intimating the names of witnesses weeks in advance of their examination was to facilitate inquiry about the antecedents, past history connections of the witnesses, so as to make effective cross-examination of them. The tactics of ever changing the list is absolutely defeating that object though guaranteed in law.

7. As submitted in their application of 28-11-1958 the prosecution is uncertain about the merit of their evidence and quality of witnesses have their attempt to change the list from time to time. This practice is malafide and the accused pray that the court should not countenance it.

8. The prosecution have so far produced about 50 to 55 witnesses and have realised to their dismay, lack of any evidentiary value of their depositions. Thus the prosecution case, however false initially has further exposed its hollowness and baselessness during the examinaion of the witnesses. The prosecution now attempt by tendering fresh lists, to fill up the

vacuum, plug the gaps and rectify the fatal mistakes in their evidence. None of these purposes is lawfull and the accused hope that court will not kindly tolerate these attempts at securing unlawful ends. The object of the trial is justice and court's impartiality to guarantee the same is the only safeguard that is available. It will in justice and good conscience refuse, therefore, any request from any party calculated to fill the vacuum in its case or otherwise to help to it to rectify the party's mistakes. Otherwise the very ends of justice will be defeated.

9. There is no law giving unbridled freedom to the prosecution to change the list of witnesses duly tendered by them. It will be unjust and unfair to allow something not sanctioned by law.

The change of list will prejudice the defence seriously, deny them the right of fair trial and defeat their rights guaranteed by law and constitution. The applicants, therefore, pray that the request of the prosecution be rejected and they be directed to stick to the list submitted by them on 24-10-58. Of course they can drop out any witnesses from the list, subject, however, to its legal implications.
Special Jail, Jammu.

Dated: 28-6-1959.

Sd. M. A. Beg.
2. Ali Shah.
3. Ghulam Mohd. Chikken.
4. Mir Ghulam Rasul.
5. Pir Mohd. Maqbool Vilgami.
6. Mohi-ud-din.
7. Mir Mohd. Nazir.
8. Pir Abdul Gani.
9. Pir Afzal Shah.
10. Mohi-ud-din Shah.
11. G. K. Beg.

———

In the Court of Mr. N. K. Hak, M.A., L.L.B.,
Special Magistrate, Magistrate 1st Class, Jammu & Kashmir,
Jammu.

STATE *Verses* MIRZA MOH'D AFZAL BEG AND OTHERS.

Under Section 121-A, R. P. C. etc.

Present :—

Mr. Nageshwar Prashad Counsel, M/S Nanda and Kaul Public Prosecutors for prosecution.

Mr. Latif Advocate and accused, excepting M/S Amin, Hamdani and Soofi Mohd. Akbar in person.

Supplementary list of Prosecution witnesses filed by prosecution on 26-6-1959.

ORDER.

Prosecution has filed supplementary list of witnesses. Prosecution has stated that it appears necessary in this case to examine these witnesses or such of them as may be considered necessary.

This has been objected to on behalf of the accused.

Both sides argued this at length.

Mr. Nageshwar Prashad Counsel for prosecution has argued that prosecution was not bound to file any list in this case; that they have done so in deference to the wishes of the accused and that it is for him to choose as to which evidence he is going to produce in the case and also the manner in which he is led to his evidence. That arrangement has to be exclusively his and there is no law that bars him to produce any witness so long as he does not close his case. The onus of proof is on prosecution and it is for him to discharge it and also to see as to how best he can do so.

Under S. 208 (1), Cr.P.C., the Magistrate shall proceed to hear the complainant, if any, and take in manner hereinafter provided all such evidence as may be produced in support of prosecution. The procedure for taking of evidence produced

in support of prosecution. The procedure for taking of evidence produced in inquiries is laid down in Chapter 18 and according to that procedure as contained in S. 208 (1), Cr. P. C., the Magistrate making inquiry before commitment has to take such evidence as may be produced in support of prosecution. It is for the prosecution to see as to what evidence it is going to produce as well as the arrangement it is going to adopt and also to seek assistance of the court to summon the witnesses as provided under sub-clause (3), S. 208.

In this case if before inquiry started prosecutor in charge of the case then, in deference to the wishes of the accused, filed a list of witnesses although prosecution was not bound under law to do so, there was no law which prevents prosecution at a subsequent stage when the evidence is going on to add or subtract in that list and also to produce further evidence in the case so long as prosecution does not close evidence in the case.

In this case out of the list of 303 witnesses previously filed only 57 witnesses i.e., less than I/5th, have so far been recorded. This is a case of very complicated nature and in a case like this prosecution will be within its rights to see as to what evidence will be necessary to discharge the onus placed upon it by law. No question of filling up the gap and fresh evidence arose in this case. No question of a "remand" or any such consideration were involved in the case in the original court. Those matters pertained to an appellate stage and are often quoted by the appellate courts under section 428 of Criminal Procedure Code.

As disclosed by the list, some of the witnesses are Magistrates, others are inspectors of police and there are Govt. employees who cannot be produced by prosecution excepting through the assistance of court and have to be summoned through the court.

Mr. Beg has argued that Sub-Sec. (3) of S. 208, Cr. P. C., does not come into play unless list filed under sub.-sec. (1) is exhausted. His contention is that prosecution cannot be permitted to revise or alter the list and unless prosecution indicates it is dropping out the list already filed, it cannot file

another list. They have fatally hit prosecution on some points in cross-examination and they should not be permitted to bridge the gulf and fill up the gap by additional evidence. Provisions of Criminal Procedure Code Evidence Act were one and the same for cases of all character and those do not prescribe any different procedure in cases of the alleged complicated character.

Mr. Latif has argued that this is nothing but fresh evidence and it is not merely a supplementary list. His contention is that Govt. has given sanction to prosecution under Sec. 196, Cr. P. C., on the material that was placed before it at that time and this has now been merely done to fill in the gaps and to fill up lacuna. Any further material in the case is nothing but manufactured.

He again referred to case diaries of various F. I. R.'s and the necessity of their production in the case also the handicap in which the defence was placed by their non-production. His contention further is that the Govt. accorded sanction for prosecution in this case on the material placed before it and so did Mr. Pathak refer to the evidence in his opening address when he addressed the court generally on facts. He contends prosecution cannot now be permitted to add to that material by way of fresh evidence.

Sheikh Mohd. Abdulla submitted he was assured by the previous senior Counsel Mr. Mitter that defence would be afforded a reasonable time to ascertain antecedents of the witnesses cited in the list and requested that in this case also reasonable time may be afforded to enable defence to ascertain the antecedents of the witnesses cited now.

Mr. Nageshwar Prashad Counsel for prosecution agreed that a reasonable time of a week or ten days may be afforded to defence for this purpose and he did not oppose this submission of Sheikh Mohd. Abdullah.

The respective contentions of the parties have been detailed above. I have carefully considered over the matter. The procedure of taking of evidence produced at the inquiry stage

has been provided under S. 208, Cr. P. C. in sub-sec. (1), 208, Cr. P. C., we find words :—

"all such evidence as may be produced in suppoert of the prosecution.....shall be taken."

This indicates that it is left to prosecution to produce its evidence in support of its case and that it is for the prosecution to choose its evidence and also the arrangement of its production. The prosecutor has got to be the best judge to see what evidence he is going to produce in support of his case so long as he does not close his case.

In this case prosecution filed a list of witnesses and so far less than 1/5th from that list have been examined. In these circumstances there appears to be no bar for the prosecution to file the supplementary list of witnesses so long as it does not close its case. The onus is on the prosecution and it is for the prosecution to see what evidence it may produce to discharge that onus. In the same manner when defence may produce its evidence it also will be within its rights to choose what evidence it was going to produce and the order in which it was going to lead its evidence to demolish the case of prosecution.

The contention of Mr. Beg that unless the previous list is dropped or exhausted no further list of witnesses can be filed by prosecution is one which cannot possibly be accepted.

The argument of Mr. Nageshwar Prashad that it is for prosecution to decide and choose as to what evidence it considers necessary to prove its case and that prosecution cannot be barred to do so, so long as it does not close its case, has a lot of force.

Mr. Nageshwar Prashad has, by way of instance, stated that supposing a witness produced to identify handwriting of certain accused person resiles from it in cross-examination then in such a case he may feel the necessity of producing further available evidence regarding that matter which he may not have felt necessary to produce earlier.

It cannot be denied prosecution is not bound under law to produce list of witnesses and it can produce its evidence

the manner it thinks best, itself being the best judge. But when a list is filed we have to see if prosecution is in that case barred under law to produce a further list or produce any further evidence which it may deem necessrry in support of its case.

No such provision of law has been brought to the notice of the court which bars such a course. So long as prosecution does not close its case prosecution cannot be precluded from producing any evidence it may choose and feel necessary in support of its case.

There is no provision of law under which court can refuse to record evidence when produced. The relevancy or admissibility of certain evidence is of course a different matter with which we are not at present concerned. This is also not the stage of the apprisal of the evidence. We are at present concerned with the right of prosecution to produce its evidence and I am unable to accept the contention of defence that prosecution is precluded under law to file supplementary list of witnesses or to produce evidence over and above the witnesses cited in list previously filed so long as it does not close its case. A court of law has to do justice to both sides and law provides issue of process to witnesses under sub-sec. (3), Sec. 208, Cr. P. C. and the party seeking that assistance from the court has got to be afforded that assistance.

In this case the supplementary list discloses that most of witnesses are Govt. employees. Some are magistrates and some police officers.

In these circumstances, this does not appear to be a case in which issue of process can be deemed necessary. Sec. 219, Cr. P. C., empowers a committing magistrate, if he thinks fit, to summon and examine supplementary witnesses even after the commitment and before the commencement of the trial. This in itself shows that the law goes even so far as to permit to summon and examine supplementary witnesses even after the commitment and before the commencement of the trial and therefore the right of the prosecution to produce supplementary witnesses or seek the assistance of court to summon

supplementary witnesses at this stage when evidence is going on and only less than 1/5th of the witnesses have been examined and prosecution has not closed its case cannot be taken away and prosecution can under law be said to be within its rights to seek assistance of the court in examination of witnesses shown in the supplementary list.

It is no duty of the court to direct a party as to the order in which he is to lead his witnesses. The court has to be very slow to interfere with the discretion of the counsel as to the order in which witnesses should be examined. There is no law under which court can refuse witnesses tendered by a party and refuse to record their evidence. The provision of Criminal Procedure Code do not give a magistrate discretion to dispense with the examination of witnesses summoned by the prosecution.

We are not in the know as to what material was placed before the Govt. when Govt. accorded its sanction to the prosecution in this case. Besides, that can possibly be no bar to the counsel in charge of prosecution to adopt his own arrangement regarding the material which he considers necessary to be brought on record in this case.

Mr. Nageshwar Prashad has argud that Mr. Pathak referred generally to facts in his opening address and did not at all refer to the witnesses and as such his address generally on facts cannot possibly have any bearing on evidence he proposes and chooses to produce in this case.

For reasons enumerated above, the objections regarding right of prosecution to file supple mentary list of Prosecution witnesses at this stage cannot prevail. In any case, however, the accused shall have to be afforded reasonable time to enable them to ascertain antecedents of the witnesses whom prosecution may choose to produce and examine. Senior counsel for prosecution has also given such an assurance to the defence.

Announced.
4-7-1959.

Sd. N. K. HAK,
Special Magistrate.

CHAPTER III.

Based on Notes by the Accused.

Opening Address delivered by Mr. G. S. Pathak for the prosecution in the Court on 14th March 1959.

The accused are charged under Section 121-A, R. P. C. and 120-B, read with Rule 32 and Rule 33 of the Security Rules.

Conspiracy to overawe the Government is a crime of very serious nature. It has dangerous effects on society. Most of the accused are well educated and have been holding positions of responsibility. This enhances the degree of their crime.

Mr Beg : According to the High Court Ruling there should be no personal remarks. The High Court ruling should be respected.

Mr. Nageshwar Prashad : The case has been opened and the proceedings of the Court should continue as per practice. In case the accused do not wish to listen they should not interfere in the proceedings.

Court : The defence counsel should not interfere.

Sheikh Abdullah : Please begin your cock and bull story.

Mr. Pathak : In brief, between 9th of August 1953 and 29th April, 1958, the accused and their accomplices both inside and outside the State collaborated with Pakistani officials to overthrow the Government with violence. Their intention was to overthrow the Government and to annex the State with Pakistan through lawlessness, to spread hatred in the masses against the Government;

(2) To start communal riots thereby endangering life and property of the masses;

(3) To recruit volunteers in order to make the conspiracy successful.

Begum Sheikh Abdullah, Mr. Beg, Chikkan, Gilani and Ali Shah received large amount of money from Pakistan for this purpose. They also received type-writers and litho-machines and literature for propaganda purposes. Besides explosives were received from Pakistan, for blowing up bridges, factories, military installations, mosques, temples and Gurdwaras, so that the Government machinery may be paralysed. People were trained in Pakistan to come and create havoc here. According to law, conspiracy can take place between two or more persons. It is not necessary that the conspiracy may be translated into action. The very agreement between the conspirators is sufficient. Conspiracies are hatched in dark and secretly, and therefore direct evidence to prove them is not necessary. If reasonable circumstantial evidence of two persons conspiring is available, the conspiracy is proved. In a conspiracy some people may be collecting funds, some may be carrying on propaganda, while others may be throwing bombs. All are equally guilty and it is not necessary that all should know each other. I shall now proceed to touch on the salient facts of the case.

Firstly, we have to see whether the charges brought up can be proved. The first and foremost thing is the security of the State for which no heed can be paid to the high station or position of any one. Pakistan attacked this State in 1947 and used various means for it. When they failed in their mission, they started indirect aggression and conspiracy. For this purpose they opened up centres at Ravlakot, Lepa, Mori Maidan and Hillan near the cease-fire line. These centres received instructions from Rawalpindi. The prosecution will prove that the conspirators had contact with these agencies. Their object was to collect military intelligence, launch propaganda and spread communal hatred.

Sheikh Abdullah was the forerunner of this Conspiracy. He was removed from the office of the Chief Minister and Bakshi Ghulam Mohammed who was the Deputy Leader was appointed to that office. On 9th of August 1953 Sheikh Abdullah was placed under detention. This was a great blow to him and he was enraged, which is apparent from his speeches

of January 1958 wherein he has used abusive language against Bakshi Ghulam Mohammad and other Government officials and called them gundas and traitors. The Sheikh does not brook any opposition and Bakshi Ghulam Mohammad became the object of his hatred and anger.

Beg : What is the meaning of the discourse ? Is there no respect for the High Court's orders ?

Court : I will hear their points of view and when your turn comes you will also be heard.

Beg : The correct time for my reply was immediately after the address, which you have turned down. What I mean is how can I stay quiet when our character is being attacked. Great injustice has been done to us.

Court : Please be patient.

Beg : How can I be patient with abuses being hurled upon me. The intention is to spread hatred amongst the masses against us with this propaganda through newspapers. Justice demands that this should be stopped or else, I should be allowed to reply the address straight away.

Court : If the prosecution does not produce evidence in support of this contention, I shall stop it.

Beg : Without my reply, their evidence shall be one-sided, which is unjust.

Mr. Pathak : Sheikh Abdullah was perturbed over the loss of his office and being angered with his Deputy who formed the next Government, he decided to overthrow him. Because he could not do so by constitutional means, he decided upon a course of criminal actions, for which he obtained support from Pakistan which suited that country. Sheikh Abdullah was an easy ally for them and he and his colleagues conspired with Pakistani Agents to overthrow the Government through criminal pressure. I shall now give details of events which are very lengthy.

In October 1953, Begum Abdullah kept up a correspondence with Major Asgar Ali Shah. Pir Ata Mohammad

worked as messenger. The Begum asked for explosives, bombs, litho-machines etc. Up to October 24, 1953, and on other occasions also she stayed with Sheikh Abdullah at Udhampur Jail. According to prosecution the Sheikh and the Begum decided to take steps in the conspiracy. On her return from her meeting with the Sheikh the Begum replied to Asgar Ali Shah's letter. Maqbool Naik brought back a reply informing the Begum that necessary substance would to provided.

All this occurred at Nihalpura. Pir Ataullah was arrested at Baramulla on November 25, 1953 with a letter of Begum. The letter is written in English and is like a puzzle. The names of the writer and the addresses hrve been kept secret. The word G. K. firm has been used for Pakistan and Khwaja Firm for herself. The word "anoliekin" has been used for Pir Ata Mohammad. All these names are fictitious, so that their innocence may be pleaded in an emergency. The Begum was doing all this in consultation with her husband. On 22-11-1953 Akbar Baksh, agent of the Hillan agency, was arrested at Tangmarg, and two letters were recovered from him. One was written by Asgar Ali Shah from Karachi, and the other was also written by him under the name of Hasan Joo, to the address of Ghulam Mohammad Dar Lieutenant. The first letter was addressed to Akbar Baksh asking him to work up a friendship with Mr. Abdul Ghani and Sardar, so that a mutiny may be organised in the militia through Ghulam Mohammad Dar. Some other people will come to Ghulam Mohammad Dar, with some proposals. Action may be taken on whichever of these proposals are acceptable. A War Council was set up on the arrest of Sheikh Abdullah and the accused were its members. Violence was their creed and rumours were being spread against the Government. For example it was said that men and women were attacked while saying their prayers and that Indian Police and Army entered a shrine with their boots on and attacked Muslims offering their prayers. The posters, pamphlets and newspapers issued by the War Council show that this party was bent upon war mongering and violence. As an example, a poster issued on 20-10-58

reads: "Time has come when the traitor Bakshi will have to pay for his deeds. He has stopped Muslims from offering prayers, desecrated a holy shrine and opened fire on Muslims. All Muslims should collect in the shrine and finish off Bakshi. Bakshi is an agent of India; he is vile, a traitor and ungrateful. The World spurns him."

The activities of the War Council continued. Pamphlets and posters also continued. One poster titled Abdullah Day, carried the slogans, "Abdullah Zindabad, and Pakistan Zindabad." The Prime Minister of India riding a donkey and followed by Indian Army was shown leaving Kashmir. This poster was recovered from the house of Ghulam Ahmed Sheri who is an important member of the War Council. Another poster reads as follows :—

"Crusaders, your success is near at hand. The days of the traitors are over. They will not get a yard of earth for their graves even. The Indian army will soon go away. The hour of their death has arrived. Traitors, even your vily patron saint Nehru has realised the certainty of your death. Pakistan has entered into a pact with America. Traitors shall soon meet their end."

These contents of the posters were broadcast in ordrer to spread hatred against the Government and the Indian Army.

All that was being done was within the knowledge of Sheikh Abdullah. During this period Mohammad Amin wrote a letter to the Sheikh which includes these words: "We have started a crusade of posters against the traitors." This letter gives a detailed account of the achievements of the War Council. What can the authors of such posters and propaganda mean except to spread hatred against the Government and to provoke communal riots among the illiterate masses and to create chaos in the country. In the middle of 1954, Mirza Afzal Beg and Khwaja Ali Shah who was a Commissioner and both of whom held high positions were lodged in Kud Jail. They collaborated with subordinate staff of the jail, by which means the conspirators kept up correspondence with Pakistan officials. Among these people, Parmanand used to take letters to

Maqbool Gilani who saw them through to Asgar Shah at Hillan Agency. Sometimes visitors and relatives of detenues also did these jobs. During this time, a special occurrence that took place was that Gulzar Khan who used to collect Military intelligence through Mirza Afzal Beg and his relatives was arrested.

After the arrest of Pir Ata Mohammad and Akber Buksh, one Mehraj Din was recruited for this work. Hillan agency used him for conveying literature and funds to Maqbool Gilani. On November 21, 1955, a lot of papers were recovered which showed that a litho-machine was sent to Maqbool Gilani for purposes of printing inflamatory propaganda, statements and news-sheets. On November 29, 1954, Mirza Afzal Beg was released. The conspirators received an incentive with his ability. A letter was recovered from Miraj Din. It was addressed to Mirza Afzal Beg and contained fictitious names. It was written by Keramat Hassan; a Pakistani Police Officer and was addressed to Ibraheem, and described Miraj Din as Azad. This letter is also full of puzzles, and contained the following:—

"Lala Mehar Chand is going abroad, which will create hindrances to our business. But it is gratifying that Israil has come out, for he can carry on the business. Israil must be consulted. I am sending a separate letter for him. He should be consulted."

According to the code list recovered, Mehr Chand is Maqbool Gilani who worked between Kud Jail and Pakistan. Since Maqbool Gilani was going for Haj pilgrimage, it was feared that work would be hampered. Mr. Beg was called Israil. Mr. Beg has used various names during this conspiracy. At that time Mohd. Khan of Rawalpindi was known as Ibraheem Khan. This letter shows Mr. Beg's relationship with Pakistan. We shall prove with evidence that Pakistan and people here worked in collaboration, Maqbool Gilani received litho machine through Sanaullah towards the end of 1955 and used it for his poster walfare, for inciting the public to violence hurling abuses and spreading false rumours against the State Police, and the Indian Government and Army.

The second letter from Khan Mohammad Khan to Miraj Din shows that "Malichh" means Indian Army and Sher Mohammad Khan means Pakistan. This letter also enquires as to what other kind of assistance is needed. A sample poster is also enclosed in which the Indian Army has been asked to quit Kashmir and the public has been advised to follow Pakistan, and posters were made according to the instructions.

According to Miraj Din's letter Mr. Beg was complying with the instructions, and he set up an Awami War Council. Another poster shows Chikkan asking the Indian Army to quit Kashmir. Another letter was seized which shows that Mr. Mohammad Afzal Beg was released on 29th of November, 1954, was a keen worker and was prosecuting with ability.

On July, 1955, Ataullah Beg brought a letter for Afzal Beg and conveyed him some instructions verbally. After that the Plebiscite Front was formed on Pakistan's advice. Its name was a camouflage. In reality, it carried on the work of the War Council and its object was to bring about the overthrow of the Government.

Before the formation of the Plebiscite Front, these people worked in the name of the War Council which had an underground charactor. The name was changed to carry on the work openly. But there was no change in its object or programme. Poster campaign, threats, incitments to violence and provocative propaganda was carried on a bigger scale through the Plebiscite Front.

One letter dated October 16, 1955, was seized from Khwaja Tajuddin. It is stated therein "literature has been sent. Get letters from Afzal Beg and Begum." On November, 1955 Mirajuddin was searched and a code-list along with this letter was recovered. These letters will be produced in the court as documentary evidence. All this work went on under the directions of Sheikh Abdullah and Mirza Afzal Beg.

The Plebiscite Front had very small income and its expenses were so heavy that they could be met only from Pakistan. Much money was not collected in the State. Another

letter of Pakistan Agency has been seized in which material for broadcast over the Azad Kashmir Radio and for propaganda in foreign countries has been asked for as also weekly reports of work.

Sajjawal Khan was in charge of Hillan Agency after the formation of the Plebiscite Front. A meeting was held with Sajjawal Khan at which Ali Shah, Pir Maqbool and Soofi Mohd. Akbar were present. At that time "Pencillin" was used as substitute for currency. Sajjawal Khan had a secret meeting with Beg Sahib and had long talks with him on August 23, 1955.

The correspondence showed that a good deal of money came from Pakistan as it had great interest in the Plebiscite Front. They received instructions and advice from there and information was sent from here. Posters and leaflets were printed according to Pakistan advice. In short, there was regular co-operation between Pakistan and the conspirators. It will be proved through evidence that the Plebiscite Front was formed in consultation with Pakistan.

Meetings were held between the conspirators where as letters and circulars from Sheikh Abdullah were read and the instructions carried out.

In October 1955, Mohiuddin Zargar, Acting President of the Plebiscite Front, received Rs. 7,000. At that time Sanaullah Khan was arrested and Begum Abdullah's letter was recovered. Rs. 15,000 were sent to Soofi Mohd. Akbar and it was directed that receipt should be secured from Beg Sahib and sent.

1956 Incidents.

Literature and poster campaign continued. The accused Chikkan went to Lahore ostensibly for a cricket match and brought Rs. 1,00,000 from Pakistan officials. The important incidents of the period are :

A letter from Khwaja Ali Shah to Sheikh Abdullah saying:—

"Time for bold and open action has come."

There were some other letters along with this letter which had come from Pakistan. According to these wafa was Chikkan's name—"Begum M. M. N. was 'Mather-i-Mihrban'." In sthis letter Ali Shah suggests formation of a volunteer corps and seeks advice in the matter. Evidently Pakistan was also interested in its gain, hence Ali Shah suggests the formation of volunteers' corps. Beg in his reply, sent under the name of Nizamuddin, and using Asadullah for Sheikh Abdullah, says, "a detailed letter has been sent to Pakistan by Asad Sahib." The letter is in reply to Niazi (Khan Mohd. Khan). At that time Sheikh Sahib, Chikkan Sahib, and Beg Sahib directly corresponded with one another.

On the search of Mirza Afzal Beg a letter from the accused Mir Ghulam Rasool was recovered in which reference was made to Sheikh Sahib's letter to the U. N. O. According to this letter he was advised to send a copy of the original letter. This letter was drafted in consultation with Pakistan and was smuggled into Pakistan. Copies of it were distributed in New York. The purpose behind the advice for a copy was that there should be no proof of correspondence from inside Jail.

The letter recovered from Afzal Beg shows that it was intended to have recourse to violence now. It was written in the letter, "A pair of scissors has arrived but there are no gardeners for its use." Apparently a "pair of scissors" meant "subversive activity."

Mr. Beg : The prosecution counsel is drawing inferences which is court's job, I strongly object to this. This is contrary to the rules. The Court should abide by the High Court's decision.

Mr. Pathak : The pair of scissors implied weapons of destruction and the gardeners—men who would use them and who had to come from Pakistan.

One letter was sent by Chikkan accused in the name of Wahab Butt to Afzal Beg in Kud Jail in the name of Nizamuddin. It says that G.B. is working boldly. G. B. means Ghulam

Rasool. Such like letters show that Sheikh Abdullah was wor ing with the conspirators outside through his sons and visitors.

The conspirators were attempting to create terror amo the people. Arms and ammunition were received from Pakist during this period. In 1956 Sajjawal Khan brought some ar to Srinagar. The object was outwardly to keep Sheikh Abdull aloof from the Plebiscite Front and its activities. At that ti one group of the party would keep its activities secret from t other group. All these illegal measures were adopted to e the Government and restore Sheikh Abdullah to premiersh This letter was written by Mohd. Amin to Khwaja Ali Shah.

At that time assistance of every kind and financial ass tance was received from Pakistan. A boy, Abdul Aziz Parwan went to Pakistan to secure the consent of his parents to mar his fiancee. A wrong use of it was made and he used to bri money and weapons of destruction. The other conspirato worked outside the jail. Sheikh Abdullah and his colleague sent instructions from inside the Jail. Sheikh Abdullah in h circulars dwelt upon religious matters and incited people t violence against the present Government to bring about a rebellion in the State.

1957 Incidents :

The activities increased. Sheikh Abdullah's circula continued to de issued on Islamic festivals in particular, suc things were written as would incite the people against th Government. The workers distributed leaflets outside. Sheik Sahib provided provocation to the people quoting from th religious books. The letters of the time show that considerabl money has been received from Pakistan.

On April 14, 1957 Afzal Beg wrote a letter to Khan Mohd. Khan (Niazi). The letter reffered to the meeting o August 23 with that officer. It ts written therein that money has reached Ali Shah. It is further said "give sixty thousand rupees to Ghulam Mohd. Chikkan (Husain Sahib). He brought the huge amount from Pakistan afterwards. It is further written that Rs. 30,000 has been sent. In this

reference is made to the first receipt and Bungalow. This money was brought by Mohd. Nazir accused on May 7, 1957. One letter was sent by Chikkan to Niazi. It is said therein that code has been changed. Instead of Hakim, Niazi and Nizam-ud-din; Iqbal, Rafiqi and Mumtaz should be used. In August 1957 many letters were exchanged between Iqbal and Rafiqi. It was written therein that the letters should be written frequently.

In August 1957 Begum Sheikh Abdullah sent a receipt for Rs. 10,000 in her own hand in the pseudo-name of "Sister". In October 1956 Niazi wrote to Begum Abdullah "Respected Sister, got receipt for Rs. 10,000 from you but no detailed letter. No letter has been received from the brother to the letter sent through other means. The reply is awaited. I am sending a copy of the letter. Please get a reply sent."

The accompanying letter referred to the letter addressed to the members of the Security Council and said that if Sheikh Sahib desired to be personally present in the Security Council every effort therefor will be made. It was further written that after coming out he would do such work as was being done in other countries. Sheikh Abdullah wrote back : "The detention is serving the purpose. If I am released I will do my best to carry out the work."

On October 10, 1957 Begum Abdullah wrote a receipt for Rs. 20,000 in her own hand. Niazi sent the money to Begum Sheikh Abdullah and wrote to the bearer that the money should be delivered to Begum. On May 1, 1958 receipt for 20 dozen eggs which is Rs. 19,700 is sent. In August 1958 receipt for five dozen eggs is given. In November 1958 Rs. 20,000 were sent for defence

In the middle of 1957 the conspirators indulged in activities which increased disorder and gave practical form to violence. The letter which Ghulam Rasool wrote to Mirza Afzal Beg said : "Haider Khan's men came last week. Pakistan wants to come out openly. The gardener has not come with the goods and the pair of scissors." The reference was to

Shakhtarashi. The meaning is clear.

On June 13, 1957 mines, booby traps and bombs started arriving. A bomb explosion took place outside Palladium Cinema, owned by a Sikh, on June 13, 1957. It was written in the letter that Sardar Sahib should be contacted. Another explosion took place on Alocha Pul. Pakistan newspapers were pasted there. On July 12,1957 explosive material was recovered from Parwana. A bomb was planted in ISC truck. A passerby picked up a booby trap and was blown to pieces. Time bombs were planted on July 23, 1957 in village Tath which killed two villagers. On September 8, 1957 a bomb explosion took place in Maisuma Mosque near the washing place and two persons were killed. The object was to bring the Government into disgrace through communal rioting. On Septemer 24, 1957 a bomb exploded in Gurdwara Darampura. On November 17, 1957 bomb exploded in a temple and damaged the "Shivling".

Bagh Ali and Ismail were arrasted. They had bombs with Pakistan markings. The persons arrested stated that these bombs had been sent by Sajjawal Khan. All these bombs were used in 1957 and the ammunition recovered is for army use only and is not commonplace. On May 25, 1957 some papers were recovered from Zaman Parrey and on May 26, 1957 from the residence of Mirza Afzal Beg and Mirza Ghulam Qadir Beg. On December 11, 1957 a note-book was recovered from the residence of Pir Abdul Ghani in which there were copies of Sheikh Abdullah's letters. A register giving details about Sheikh's letters was also recovered.

In January 1958, Sheik Abdullah delivered speeches in Mosques. He was arrested on April 29, 1958 and two letters were recovered. One recorded the progress of volunteer corps and the other was a letter from the Plebiscite Front which had corrections made thereon in Sheikh Abdullah's hand.

Some witnesses bave been accomplices in the crime and some not. Some witnesses are there in regard to searches, code, bombs, loss of life and other evidence.

All this has been stated by way of instances.

Sheikh Abdullah : Is that all Mr. Pathak ? You have solved the Kashmir problem !

In the Court of Special Magistrate, Jammu.

STATE *Versus* MIRZA MOHD. AFZAL BEG AND OTHERS.

The petitioner's humble petition sheweth :—

1. That the Counsel for Prosecution have declared their names to address generally on the case immediately at this stage.

2. That present is the stage of inquiry when the Prosecution witnesses have got to be examined.

3. That under law at this stage the Court must forthwith proceed with the examination of the witnesses and that law does not permit the said address of the Prosecution to be made now.

4. That this bar to make an address at this stage is purposeful in order to protect the interests of the accused who have got to hear the evidence of the Prosecution.

5. That an address before the Prosecution evidence is led in the inquiry stage is likely to prejudice the Court and thereby create a bias in its mind even before the Court has heard any evidence whatever. Such an address is further likely to create a poisonous atmosphere in the public. Both these events will seriously prejudice the defence if the said address is allowed.

6. It is in view of the above that the Cr. P. C. deliberately omits to make any provision for the Prosecution address at this stage, and on the contrary makes mandatory provision for the forthwith examination of the witnesses at this stage.

7. That at the begining of this inquiry on 11th June 58, this Court refused to take down the statements in regard to torture, repression and brain washing of some of the accused on the ground that the Court was not bound under law to do it. The accused had therefore only filed written statements.

8. That both in view of law and practice referred to above, the accused pray that Prosecution be not allowed to make the said address at this stage.

Dated 1-12-58.
Special Jail, Jammu.

1. M. A. BEG.
MIRZA MOHD. AFZAL BEG AND OTHERS.

Sd.
(Accused).

2. Ghulam Mohd.
3. Pir Abudl Gani.
4. Mohi-ud-din.
5. G. K. Beg.
6. Ghulam Rasool.
7. G. Mohi-ud-din.
8. Mir Mohd. Nazir.
9. Pir Afzal.
10. Mohi-ud-din.
11. Ali Shah.
12. Soofi Mohd. Akbar.
13. Ghulam Mohd. Chikken.
14. Mohi-ud-din Shah.

In the Court of Mr. N. K. Hak, M.A., LL.B., Special Magistrate, Magistrate 1st Class, J. and K.

Criminal File No. 1 of 1958.
Date of Institution—21st May, 1958.
Date of Decision—Pending.

STATE *versus* MIRZA MOHD. AFZAL BEG AND OTHERS.

Under section 121-A, R. P. C. etc.

Application of Mr. Latif, Advocate, and Mirza Mohd. Afzal Beg, accused, Dated 1-12-1958.

Present:- Counsel for the parties and the accused in person.

ORDER.

In these applications it has been prayed that Prosecution Counsel may not be permitted to make his opening address.

Mr. Latif argued that there was no provision in inquiry for any opening address by the prosecution and that was only provided in a trial as envisaged under Section 286 of the Code of Criminal Proceedure. He argued that by such a course the accused might be prejuidced.

Mr. Beg also argued on the same lines.

Mr. Mitter, Senior Counsel for Prosecution, submitted that this is going to facilitate defence of the accused who will be in a better position to know the case against them.

Sec. 208 (1) provides that when the accused appear or are brought before the Magistrate, the Magistrate shall proceed to hear the complaint (if any) and take all such evidence as may be produced in the manner provided. It is conceded that the complainant has a right of audience under this Section and the only point to be considered in these applications, therefore, is whether this right of audience is restricted to the complainant alone is wide enough to include Counsel for Prosecution.

To my mind it appears that this right is wide enough even to include Counsel for Prosecution and is not restricted to complainant alone. In this, I feel fortified by the precedent of the opening address by the Special Public Procecutor in case King Emperor *versus* Phillip Spratt and others (Meerut Conspiracy Case) before the Committing Magistrate brought to my notice by the Senior Prosecution Counsel.

These applications are disposed of accordingly.

Announced.
1-12-1958.

Sd.....
Special Magistrate,
Jammu.

No. 233/S. M. Dated 3-12-1958.

Forwarded in original to the Superintendent, Special Jail, Jammu ,for favour of passing it on to Sheikh Moh'd Abdullah accused, as prayed by him.

Sd.....
Special Magistrate.

Copy of the Revision Application.

IN THE COURT OF SESSIONS JUDGE, JAMMU.

[File 421 Cr. Revision. Institution 19-12-59. Decision 27-12-59.]

1. Mirza Mohammad Afzal Beg s/o Mirza Nizam Beg, Sarnal, Anantnag, Kashmir.

2. Khan Ghulam Mohammad Chikan s/o Khan Abdul Aziz Butt, Karan Nagar, Srinagar, Kashmir.

3. Mohiuddin s/o Khan Abdullah Joo, Kadipora, Anantnag, Kashmir ... ... Applicants.

versus

1. State of Jammu and Kashmir.

2. Inspector-General of Police, J. & K. State, Shri D.W. Mehra I. P. ,, ,, ,, Non-applicant.

Revision application against the order dated Ist December, 1958, of Shri N. K. Hak, Special Magistrate, Jammu.

The applicants submit as under :-

1. The applicants along with other accused, mentioned below, are facing inquiry instituted by non-applicant No. 2 on 21-5-58 under Section 121-A of R. P. C. and 120-B of R. P. C. read with Rule 32 of the J. and K. Security Rules and Rule 32 of the said Rules in the Court of Special Magistrate, Shri N. K. Hak.

1. Kh. Ali Shah s/o Kh. Ahmed Shah. Bahg Magharmal, Srinagar, Kashmir.
2. Mirza Ghulam Qadir Beg s/o Mirza Mizam Beg, Anantnag.
3. Mir Ghulam Rasool s/o Mir Ahmed Shah, Raj Bagh, Srinagar.
4. Sofi Mohommad Akbar s/o Assadullah, Sopore.
5. Pir Mohammad Maqbul s/o Pir Hussan Shah, Handwara.

6. Pir Abdul Gani s/o Pir Ghulam Ahmed, Anantnag.
7. Mir Mohammad Nazir s/o Mir Hussan Bux, Srinagar.
8. Ghulam Mohiuddin Hamdani s/o Ghulam Moh'd Zuhra Hamdani, Srinagar.
9. Pir Mohammad Afzal Mukhdoomi s/o Ahmed Shah, Srinagar.
10. Mohiuddin Shah s/o Kh. Ali Shah, Srinagar.
11. Kh. Mohammad Amin s/o Kh. Amir-ud-din, Srinagar.
12. Sh. Mohammad Abdullah s/o Sh. Mohd. Ibrahim, Srinagar.

2. The said Special Magistrate is holding the proceedings in Jammu near the Special Jail where the accused are lodged.

3. The inquiry is at present at the stage when the prosecution witnesses are yet to be examined.

4. Before such examination could start the Senior Counsel for the Prosecution claimed the right of audience in order to address the Court generally on the facts of the case. The learned Counsel based his claim on the word "Complainant" occurring in Section 208, Cr. P. C.

5. The applicant and the other accused objected to this supposed right and also repeated their previous objection to the applicability of Section 208, Cr. P. C., to these proceedings.

6. The learned Magistrate, however, agreeing with the Senior Counsel for Prosecution, passed the order on 1-12-1958 holding that :-

> "To my mind it appears that this right is wide enough even to include Counsel for prosecution and is not restricted to complainant alone."

7. This view of the learned Magistrate is against law and the order in question is incorrect, illegal and the procedure of the said Magistrate is irregular and therefore liable to be set

aside on the following grounds:—

(a) The order under revision has caused grave miscarriage of Justice.

(b) The order sets a unique precedent making fundamental departure from the procedure established by law.

(c) The order violates the mendatory provisions of law.

(d) The right of address given to the Prosecutor is provided by Section 286, Cr. P. C., which, being the trial stege is inapplicable in law to the inquiry stage.

(e) That amongst the provisions governing the inquiry as laid down by law, there is no provision for an opening address of the Prosecutor, or the Prosecution Counsel.

(f) That the provisions of law excluding the right of prosecution address at the inquiry stage is calculated to protect the rights and the interests of the accused guaranteed by law.

(g) That the learned Magistrate as a Court of law had to declare and apply law as it is and not make new law, as he had done by the order under revision.

8. That previous to 1-12-1958, when the said order was passed, the applicants and the accused had raised and argued the following important points of law before the learned Magistrate :—

(a) The proceedings of the inquiry against the accused are governed by section 207-A of the Cr. P. C. and not by the Section 208 of that code.

(b) Section 2 of Act XLII of 1956 is ultra vires of the State Constitution of 1996 and therefore null and void, the effect being that rest of the provisions of Act XLII of 1956, are in force and operative in the State.

After hearing the arguments of the parties, the learned

Magistrate by his Order of 29-11-1958, reserved his decision on the two said points of law till a future date convenient to him.

9. It was incumbent under law for the learned Magistrate to give his pronouncement on the points referred to in para 8 above applying the word "complainant" of Section 208, Cr. P. C., for deciding Prosecution Counsel's so-called right of address on facts of the case. Accordingly the accused applicants brought once again to the notice of learned Magistrate this matter of procedure and law during the course of argument on Prosecution Counsel's plea for the said address.

10. In complete disregard of the above submission as also in violation of established practice of law and justice, the learned Magistrate on 1-12-1958, decided the question of right of address raised by the Prosecution Counsel, thereby prejudging the disposal of said points of law.

11. Both the decision and the procedure adopted by the learned Special Magistrate has caused grave miscarriage of Justice and renderd negatory their rights guaranteed by law.

12. The learned Special Magistrate's order of 1-12-1958 under revision, being illegal, improper, and irregular, the applicants pray :—

(a) That the order be set aside and quashed.

(b) That as the order is inter-linked with the points of law raised in paragraph 8 above, the Learned Special Magistrate be directed to stay proceedings pending before him till the disposal of this application.

(c) That record of the case before the Learned Special Magistrate may be called for the proper disposal of this application.

(d) That the applicants having no Counsel are defending themselves personally, and may therefore be permitted to appear and argue this application in person before your Hon'ble Court; and

(e) Such other directive may be issued as this Hon'ble Court thinks fit in Law and Justice.

Sd. 1. M. A. BEG;
2. GHULAM MOHD. CHIKKAN;
3. MOHIUDDIN.

Special Jail, Jammu.
Dated 18-12-1958.

Enclosures.

(1) The Special Magistrate's Order of 1-12-1958.
(2) Affidavit.

In the Court of Pt. R. K. Koul B.A.,LL.B. Sessions Judge, Jammu.

Date of institution 19-12-1958.
Date of decision. 22-12-1958

1. Mirza Moh'd Afzal Beg son of Nizam Beg resident of Anantnag.
2. Kh. Ghulam Moh'd Chikken son of Kh. Abdul Aziz Batt resident of Srinagar.
3. Mahi-ud-Din son of Abdullah Joo resident of Anantnag.

Accused (under-trial prisoners (Special Jail, Jammu).

versus

1. STATE.
2. Inspector-General of Police, J. and K. State, Shri D. W. Mehra I. P. .. ..Non-applicants.

Criminal Revision No. 42 of 1958-59.
Revision against the order of the Special Magistrate, Jammu, dated 1-12-1958.

Petitioners in person.

Messers J. P. Mitter and Advocate General for the opposit Parties.

JUDGMENT.

This is a revision petition by three of the accused persons in the conspiracy case against the order of the Special Magistrate (Committing Magistrate) Jammu dated 1st December, 1958 permitting the Prosecution Counsel to make his opening address before producing his witnesses for examination.

In his order under revision the learned Magistrate has observed :—

> "Section 208 (1) provides that when the accused appear or are brought before the Magistrate, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in the manner provided. It is conceded that the complainant has a right of audience under this section and the only point to be considered is whether this right is wide enough to include Counsel for Prosecution and is not restricted to complainant alone."

After making the above observations the learned Magistrate has held that to my mind it appears that this right is wide enough even to include Counsel for Prosecution and is not restricted to complainant alone.

Thr learned Magistrate has merely observed that section 208 (1) confers the right of audience on the complainant as also on the Counsel for prosecution but he has not stated how the above right conferred on the complainant could be exercised by the Prosecution Counsel or what the right of audience meant, or how it included the right of making an opening address on the facts of the case. One should have expected the Magistrate to give reasons by reference to the provisions of law or rulings of High Courts in support of the view taken by him but he has not done that. The only precedent referred by him is that in the Meerut Conspiracy case the Special Public Prosecutor made an opening address before the Committing Magistrate. The mere fact that this happened in a celebrated case is no authority for supposing that such a right of the Public Prosecutor was recognised in any State in India or even in the United Provinces where that case was tried at. If the Public Prosecutor's claim to open the case had been

challenged by the accused but upheld by the High Court on then could that case be referred to as an authority in suppo of the view taken.

Mirza Mohammad Afzal Beg petitioner argued this ca for himself and for other petitioner's and Mr. J. P. Mitter an the Advocate General argued for the prosecution. Before argu ing the case a serious grievance was expressed by the petitioner that the learned Magistrate had passed the order unde revision before recording his dicision on the following tw preliminary points of law raised by the accused before him.

(a) "The proceedings of the inquiry against the accuse are governed by section 207-A of the Criminal Proce dure Code and not by section 208 of that Code ; an

(b) Section 2 of the Act XLII of 1956 is ultra vires of th State constitution of 1996 and therefore null an void, the effcct being that the rest of the provision of Act XLII of 1956 are in force and operative in th State."

The grievance of the petitioners in this behalf is we founded because these questions, besides being important them selves have a far reaching bearing on the particular procedur to be adopted in the inquiry proceedings and therefore they should have been disposed of before proceeding further with the case or passing the order in question. On his making thi complaint Mr. Beg was told to argue these questions also now and here before this Court as in view of the order questioned in this revision the Magistrate may be presumed to have impliedly decided these questions against the accused. I would have liked to hear the respective cases of the parties on this question also but Mr. Beg did not agree to argue them on the ground that the learned Magistrate had not in fact decided them and only when they were decided would he take such steps as in the circumstances he would consider appropriate. He argued this revision with the reservation that his right to challenge the future decision of the Magistrate on these two questions remained uneffected and that he was not understood to have waived it. In view of the position taken up by Mr.

Beg these questions shall remain open so far as this Court is concerned.

Two questions arise for consideration in this case firstly whether the right of being heard given to the complainant in Sction 208 (1) of the Code of Criminal Procedure can be exercised also by his Counsel and secondly whether the words "the Magistrate shall hear the complainant" used in the above sub-section mean that the Magistrate shall hear an opening address in regard to the facts of the case. For appreciating these questions it will be helpful to refer to the provisions of the Code on the subject. The right to make an opening address is claimed by the Prosecution on the strength of the words "the Magistrate shall proceed to hear the complainant (if any)" occurring in sub-section (1) of Section 208. That section provides :—

"The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate."

It may be observed here that the words on the strength of which the right to make an opening address in inquiry proceedings is claimed by the Prosecution are not peculiar to Section 208 (1) but are to be found in Section 244 (1) and 252 (1) relating to the trial of summons cases and warrant cases respectively. Section 244 (1) provides :—

"If the Magistrate does not convict the accused under the preceding section or if the accused does not make any admission, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced snsupport of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence."

Section 252 (1) provides :—

"When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the

complainant (if any) and take all such evidence as may be produced in support of the prosecution."

It will be readily noticed that the words used in Section 208 (1), 244 (1) and 252 (1) in regard to the hearing of the complainant are exactly the same. It is clear that these sections provide firstly that it is the complainant (if any) who is to be heard and secondly that the only right given to the complainant is that he shall be heard and not that he shall make an opening address in regard to the facts of the case. In distinct contrast to the aforesaid sections, section 286 (1) provides for an opening address by the Prosecutor at the trial before the Court of Sessions. That section provides :—

"When the assessors have been chosen, the prosecutor shall open his case by reading from the Ranbir Penal Code or other law the description of the offence charged, and stating by what evidence he expects to prove the guilt of the accused."

The contrast to the provisions of Sections 208 (1), 244 (1) and 252 (1). Section 286 (1) speaks of the "Prosecutor" and not of the "Complainant" and also of opening his case bythe prosecutor "stating by what evidence he expects to prove the guilt of the accused" and not of merely hearing the prosecutor. The fact that a provision in regard to the opening of his case by the prosecutor has been made in Section 286 (1) and not in Section 208 (1) would make it clear beyond any doubt that the legislature did not intend to provide for the opening of a case by the prosecutor at the stage of inquiry before the Magistrate. If it were not so there would have been provision similar to that in Section 286 (i) in Section 208 (1) also. I am not convinced with the contention on behalf of the Prosecution that what they claimed before the Magistrate was not the right provided for in Section 286 (1). There is no room for the slightest doubt that the claim made on behalf of the prosecution is nothing but that provided for at the trial before the Court of Session under Section 286 (1) which the Code has not given at the stage of inquiry before the Magistrate.

Coming to the provisions of Section 208 (1) itself, I have

no doubt that the word 'complainant' used in it cannot possibly be interpreted to include the complainant's Counsel also. The word 'complaint' has been defined in the Code itself and, therefore, unless otherwise justified by the context, its meaning must be taken as given in the definition. The word "complainant" would accordingly mean one who makes a complaint. Unless otherwise justified by the context, it cannot mean the complainant's Counsel also. It has to be clearly borne in mind that there is a difference in some matters in regard to the procedure to be followed in cases initiated on a complaint and in cases initiated on a police report and one consistent meaning has to be given to the word complainant wherever used in the Code. From a perusal of the various provisions of the Code in which the word copmlaint occurs it will be clear that it does not also mean the complainant's Counsel. If the purpose and scope of Section 208 (1) is kept in view it will be seen that it deals not only principally but solely with the taking of all evidence in the case, namely evidence produced not only by the Prosecution and in behalf of the accused but also that called for by the Magistrate himself. The words "shall hear the complainant" preceding the words "and take all such evidence" would make it clear beyond that the word complainant was not intended to include the complainant's Counsel also. I asked the learned Counsel appearing for the Prosecution whether there was any ruling of any High Court of India extending the meaning of the word complainant used in Sections 208 (1), 244 (1) and 252 (1), so as to include complainant's Counsel also. He conceded that he had not found any such authority. He, however, referred to a ruling of the Patna High Court reported in A. I. R. 1920 Patna 383 in a case under Section 145 of the Code of Criminal Procedure. In that case there was a dispute with regard to the collection of offerings at a Karbala and one of the grounds taken by the petitioners in the revision before the High Court was "that the Magistrate acted improperly in not hearing the arguments of the Counsel appearing on their behalf" and after quoting the provisions of Section 145 (4) the following observations have been made in the judgement :—

"Here the parties means hear the evidence of the parties and arguments of Counsel appearing on their behalf or arguments addressed by themselves and if the Magistrate refuses to hear arguments, he is not complying with the provisions of law which are imperative."

In this ruling the only right conceded to the Counsel is that of addressing arguments to the Court which is quite distinct from the right of making an opening address. This ruling, even though in a case under Section 145, does not support the contention of the learned Prosecution Counsel. I should like to make it clear that if this ruling were in full support of the Prosecution Counsel's contention, I would not, with utmost difference to the ruling be prepared to follow it in a case under Section 208 (1) or under Sections 244 (1) or 252 (1). It can not be disputed that a proceeding under Section 145 is of a quasi executive character. The action is of a purely preventive and provisional nature in a civil dispute pending formal adjudication of the rights of the parties and is not of a punitive nature. The primary object of the proceeding is the prevention of the breach of the public peace arising in respect of a dispute relating to immoveable property. An application to a Magistrate to take action under that section is not a complaint.

Another important feature of a proceeding under this section is that in the event of the death of a party to any such proceeding it permits the substitution of his legal representatives on record. The fact that there is no authority old or recent, of any High Court in India, interpreting the word "complainant" used in sections 208 (1), 244 (1), or 252 (1) as including the complainant's Counsel also would make it clear beyond any doubt that the claim made in this case on behalf of the Prosecution was never made at any time in India and that the word complainant as used in the above sections does not mean the complainant's Counsel also. For the foregoing reasons I am clearly of the opinion that the Prosecution Counsel is not entitled to make an opening address in inquiry proceedings before the Magistrate and that the order of the Magistrate

permitting this unauthorised under law.

I now come to the second question namely whether the hearing to which the complainant is entitled under Section 208 (1) or under sections 244 (1) or 252 (1) means the opening of the case. The learned Prosecution Counsel argued that as the words "hear the complainant are used before the words" and take all such evidence it would imply that the word 'hear' is used in a sense quite different from the words" examination as a quitness, for otherwise this word would not have been used. One of the rules of interpretation of statutes, it is true is that the legislature does not use superfluous or unnecessary words in a statute. There is force in this contention. There are a few reported cases in which the complainant was not examined and the words "Shall hear the complainant" as used in sections 208 (1), 244 (1) and 252 (1) came for interpretation and it was held that hearing of the complainant was not the same thing as his examination on oath, and that therefore, his non-examination did not vitiate the proceedings. In 1929 Calcutta 229, the complainant had not been examined at the inquiry before the Magistrate and it was held that this fact did not vitiate the order of the commitment as section 208 (1) only enjoins that the complainant (if any) shall be heard and not that he shall be examined. It has further been observed that in this case it is not suggested that the complainant was not heard, "but there is nothing in this judgement to indicate what was intended to mean by hearing. In 1920 Calcutta 68, which was a summon case and in 1922 Madras 126, 1935 Patna 516 and 1938 Nagpur 103, which were warrant cases, the same view was taken namely that the examination on oath of the complainant was not obligatory under Sections 244 (1) and 252 (1). In none of the above rulings has the meaning of the word "hear" occurring in these sections been discussed. Perhaps the only authority in which an attempt was made to interpret the word "hear" is 1945 Nagpur 127. In that case the question arose as to the meaning of the word "reheard" used in section 350 (1) and the meaning of the words the Magistrate shall hear the complainant as used in sections referred to above was discussed elaborately. The following

observations in that ruling may be cited :—

".....but the difficulty arises in determining exactly of what the hearing actually consists. In every practice it means the examination of the complainant or the parties and this examination includes examination in chief, cross examination and re-examination. With regard to the hearing of a complainant under sections 208 (1), 244 (1) and 252 (1) and of the parties under Section 145 (4) the conclusion must be that it merely amounts to a granting of audience and while it does not amount to an examination it does confer a right of audience. This too is the position in everyday practice and in most cases a complainant or party enters the witness-box for examination."

It may be noted here that the word "hear" used in relation to the accused in section 244 (1) has also been discussed in the above Nagpur ruling. Considering the case Law on the subject it seems clear to me that the words "The Magistrate shall hear the complainant" used in section 208 (1), 244 (1) and 252 (1) mean that the Magistrate shall examine the complainant only if he desires to be examined in support of his complainant but that if he does not offer himself for examination it is not obligatory on the Magistrate to examine him and the proceeding will not be vitiated if he is not examined. The choice of the complainant being examined is left with the complainant himself and no obligation attaches to the Magistrate in regard to it. The right of audience referred to in 1945 Nagpur 127 simply means the right to be examined if the complainant so chooses. The word "hear" is nowhere defined in the Code and the Dictionary meanining of the word, to which a reference was made by the learned prosecution counsel, is not different from what has been stated above. For reasons given above I am of the opinion that the order of the Magistrate is wrong and must be set aside.

The record is accordingly submitted to the Hon'ble High Court of Jammu and Kashmir at Jammu with the recommendation that the order of the Special Magistrate

Jammu dated Ist December 1958 permitting the prosecution counsel to open his case be set aside. I do not think it necessary to call for a report from the Magistrate The Special Magistrate shall be informed of this recommendation and directed to stay further proceedings in the case pending orders of the Hon'ble High Court on this reference. Announced.

Jammu : 27th December 1958.

R. K. KAUL,
Session Judge,
Jammu.

The High Court of Jammu and Kashmir.

Present :

The Hon'ble Janki Nath Wazir, Chief Justice

and

The Hon'ble Syed Murtza Fazl Ali, Judge,

MIRZA MOHD. AFZAL BEG AND OTHERS *Vs* STATE.

Criminal Reference No. 48 of 1958 made by the Sessions Judge, Jammu, dated the 27th Decemcer 1958.

Mr. M. A. Beg for the petitioners.

Mr. Jaswant Singh, Advocate General, Messrs Suraj Parkash, V. S. Malhotra and J. L. Sehgal for the State.

Wazir C. J.

The facts which have given rise to this reference briefly stated are these. In a conspiracy case before the Special Magistrate the counsel for the prosecution claimed a right under S. 208 (1) of the Criminal Procedure Code to make his opening address before producing his evidence for examination. Objection was taken by the accused that the prosecution counsel had no right to make an opening address and that under S. 208 (1) the complainant could only be examined on oath in support of his complaint. The Trial Magistrate overruled this objection and held that the complainant had got the right

of audience and that right was wide enough to be exercised by the counsel for the prosecution and was not restricted to the complainant alone. Three of the accused, Messrs Mohd. Afzal Beg, Ghulam Mohd. Chikken and Mohiuddin filed a revision application against that order before the Sessions Judge and the learned Sessions Juage came to the conclusion that the words "the Magistrate shall hear the complainant" used in S. 208 (1) meant that "the Magistrate shall examine the complainant, only if he desire to be examined in support of his complaint and the counsel for the prosecution has no right of audience under the above section". The learned Session Judge has made this reference recommending that the order of the Special Magistrate dated the Ist December 1958 permitting the prosecution counsel to open his case be set aside.

This reference is supported by Mirza Afzal Beg who argued the case for himself and for other petitioners while the Advocate General opposed the reference.

The question for consideration in this reference is whether the expression "shall hear the Complainant" occuring in S. 208 (1) of the Code of Criminal Procedure means that the Magistrate shall listen to the opening of the case by the complainant giving the facts of the case and the nature of the evidence to be adduced by him to prove those facts, or whether it means the examination of the complainant on oath in support of his complaint and secondly if the complainant has the right of audience whether or not that right is extended to his counsel as well.

For the proper appreciation of these points it is necessary to refer to certain provisions in the Code of Criminal Procedure.

Section 200 specifically provides for the examination of a complainant upon oath if the complaint is not lodged by the Court or by a public servant acting or purporting to act in the official discharge of his duties. In the section the expression used is not "to hear the complainant" but is "to

examine the complainant upon oath", whereas in S. 208 (1) the words are "the Magistrate shall proceed to hear the complainant". It is, therefore, clear that there is manifest difference between the expression "examine the complainant" and the expression "hear the complainant".

The expression "hear the complainant" does not only occur in S. 208 (1) but these words are used in Sections 244 (1) and 252 (1) relating to trial of summons cases and warrant cases respectively and these words are followed in all these sections by the words "and take all such evidence". The use of the expression "to hear" and the other expression "to take such evidence as may be produced" occusing in Section 208 (1), sections 244 (1) and 252 (1) clearly shows that there is a palpable difference between hearing the complainant and examining him. If the legislature intended that the complainant also should have been examined by the Magistrate as other witnesses are to be examined in support of his complaint, it was not necessary to use the word "hear" with reference to the complainant and the words "take such evidence" in respect of the witnesses. In that case the words "the Magistrate shall proceed to examine the complainant and other witnesses" would have been used instead of the words "shall proceed to hear the complainant and take such evidence as may be produced". It is well settled that the legislature never wastes words. It is also a settled principle of construction that significance and meaning must be attributed to every word used by the legislature. The section, as pointed out above, requires that the complainant shall be heard and not examined. The word "hear" obviously means something other than taking evidence or examination of the commplainant.

According to the Webster's New International Dictionary the word "hear" means to be informed as by oral communication, and "hearing" has been defined in the same dictionary as attention to what is delivered; opportuunity to be heard audience. The Concise Oxford Dictionary defines the word as meaning listen; give audience. The same meaning is assigned

to the word in Chambers' Twentieth Century Dictionary.

This construction also receives support from certain decided cases. In A. I. R. 1929 Cal. 229 it has been held :—

> "Section 208 (1) enjoins that the complainant if any, shall be heard. It is not examination of the complain ant that is necessary but only that he shall be heard. There is palpable difference between the hearing the complainant and examining him".

In A. I. R. 1922 Mad. 126 at page 128 it has been remarked that "the expression used in S. 252 is 'hear the complainant'. The taking of evidence is separately referred to. We have been shown no authority for holding that hearing the complainant involves his examination on oath".

In A. I. R. 1945 Nag. 127 which has been referred to by the learned Sessions Judge in his reference, the word "reheard" came up for interpretation and it is observed in this case as follows :—

It will thus be seen that hearing of the complainant under S.208 (1), 244 (1) and 252 (1) and of the parties under S. 145 (4) does not necessarily mean their examination. With regard to the hearing of a complainant under Sections 208 (1), 244 (1) and 252 (1) and of the parties under S.145 (4) the conclusion must be that it merely amounts to a granting of of audience and while it does not amount to be an examination it does confer a right of audience.

Moreover, from the provision of S. 244 (1), it would be clear that the expression "hear" used in Sections 208 (1), 244 (1) ond 252 (1) does mean the examination of the complainant on oath. The words "the Magistrate shall proceed to hear" are used in reference to the accused as well in S.244 (1) which supports the view we have expressed that the word "hear" does not mean examination on oath as the accused cannot be examined on oath.

Mr. Beg has drawn our attention to the marginal heading of S. 208 (1) and has argued that under this section the evidence of the complainant and his witnesses in support of the complaint

and the evidence in defence by the accused has to be recorded by the Magistrate and he wants us to interpret the word "hear" used in this section in the light of the marginal heading which is "Taking of evidence produced".

The argument though specious is not sound. In the first place the Courts are not entitled to look at the side heading of a statute in interpreting the statute. The legislature is not responsible for the side-headings. In A. I. R. 1950 S. C. 134 it has been held that "marginal notes of an Indian statute as in Act of Parliament cannot be referred to for the purpose of constructing a statute. Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment".

The same view was taken in another Supreme Court case reported as A. I. R. 1953 S. C. 148 where it was held as under:-

The marginal note cannot control the meaning of the body of the Section if the language employed therein is clear and unambiguous. If the language of the section is clear then it may be that there is an accidental slip in the marginal note rather than that the marginal note is correct and the accidental slip is in the body of the section itself.

The learned Sessions Judge has compared the provisions of Sections 202 (1), 204 (1) and 252 (1) with section 286 (I) and has remarked that in section 286 a clear provision is made giving the right of mking an opening address to the prosecutor in sessions trial whereas in sections 208 (1), 244 (1) and 252 (1) no such clear provision is made and, therefore, he concludes that the complainant has got no right of making an opening address. In my opinion there is some fallacy in this argument. Section 286 (1) provides that the prosecutor shall open his case by reading from the Ranbir Penal Code or other law the description of the offence charged and stating by what evidence he expects to prove the guilt of the accused. Section 270, Cr. P. C., lays down that in every trial before a Court of Sessoins the proscution shall be conducted by Public Prosecutor. It is, therefore, clear that place of the complainant in the sessions trial is taken by the Public Prosecutor and provision is made

in S. 286 (1) as to how the prosecutor has to conduct his case when the assessors have been chosen. The object and scope of S. 286 (1) therefore, is quite different from that of Ss. 208 (1), 244 (1) and 252 (1). In the sessions trial when the assessors are chosen the prosecutor has to give the dercription of the offence by reading from the Ranbir Penal Code and has to state by what evidence he expects to prove the guilt of the accused. He has to open the case in a manner that the assessors who may uot be law-knowing persons are made aware in regard to the ingredients of the offence and also are apprised of the nature of evidence which is going to be led to prove the guilt of the accused. While in S. 208 (1) the complainant has right of audience and he has to detail the facts which constitute the offence and the evidence which he is going to produce in support of his case.

The object of S. 208 (1) appears to be to appri e the Magistrate of the facts which constitute the offence aud also of the evidence the complainant is going to lead to prove those facts. This section is partly for the benefit of the accused so that he may know what he has to say in his own defence against the charge which has been brought against him and explain at the appropriate stage the evidence which has been led in support of the charge, and partly to enable the Court to control the proceedings at the committal stage by not allowing unnecessary witnesses to be produced by the prosecution and by excluding inadmissible and irrelevant evidence which might delay the proceedings and unnecessarily hereas the accused.

In the result I am of definite opinion that the word 'hear' used in relation to the complainant in S. 208 (1) does not mean examining the complainant but means granting audience to the complainant, that is, he has to deatail the facts which constitute the offence and to state by what evidence he is going to prove those facts.

The next question is whether the right of audience given to the complaint can be exercised by the counsel for the complainant as well.

The question presents no difficulty for if the right of audience is conceded to the complainant, surely he can have that audience and exercise that right through the counsel. The counsel is merely an agent of the principal and his action is to be recognised and taken notice of as the act of the principal, that is, the complainant. This view receives support from A.I.R. 1920 Patna 383 in which it is held that hearing the parties means hearing the counsel or the pleader appearing on behalf of the parties. If the word "hear in S.208 (1) had been used to mean the examination of the complainant as it provided in S. 200 Cr. P. Code the question of the counsel appearing on behalf of the complainant did not arise. But as we have interpreted the word "hear" to mean granting audience to the complainant, his counsel is competent to appear on his behalf and detail the facts which constitute the offence and the evidence proposed to be led to prove these facts.

For the reasons given above, I am unable to accept the recommendation made by the Sessions Judge and would, therefore, reject this reference.

Sd. J. N. WAZIR,

I agree,

Jammu : Sd. S. MURTAZA FAZL ALI.
the 29th January, 1959.

In the High Court of Jammu and Kashmir, Jammu.

1. Mirza Mohammad Afzal Beg s/o Mirza Nizam Beg of Sarnal, Anantnag.

2. Ghulam Mohammad Chikken s/o Kh. Abdul Aziz Butt of Karan Nagar, Srinagar.

3. Ghulam Mohi-ud-Din s/o Kh. Ali Shah of Bagh Magharmal, Srinagar .. .. Applicants.

versus

1. State of Jammu and Kashmir.

2. Inspector General of Police, Jammu and Kashmir State, Shri D. W. Mehra, I. P. .. .. Non-applicants.

Application for leave to appeal to the Supreme Court of India under Articles 132 (1) and 184 (1) (c) of the Constitution of India.

The humble petition of the above named petitioners most respectfully showeth :—

1. The petitioners Nos. 1, 2 and 3 had submitted a revision application to the learned Sessions Judge, Jammu, againet the order of Shri N. K. Hak, Special Magistrate, Jammu, dated 1-12-1958 whereby he had held that complainant Counsel has the right of making a general address on the facts of the case at the enquiry stage under Section 208 (1), Cr. P. C.

2. The learned Sessions Judge, Jammu, rejecting the view of the Special Magistrate made a reference on 27-12-1958, to the Hon'ble High Court recommending that the said order of the Special Magistrate be set aside.

3. This Hon'ble Court by its order of 29-1-1959 has rejected the Sessions Judge's reference and upheld the finding of the Special Magistrate.

4. The applicants beg to file this application praying for leave to appeal to the Hon'ble Supreme Court under Articles 132 (1) and 134 (I) (c) of the Constitution of India, against the said decision of the Hon'ble High Court. The applicants submit the following grounds for the said leave to appeal and for the consideration and acceptance by this Hon'ble Court.

5. That the said decision of this Hon'ble Court has raised a substantial question of law, which calls for final pronouncement by the Hon'ble Supreme Court.

6. That the said decision raises a point of law of widest public and private importance and involves a grave issue from the point of view of the jndicial administration.

7. That the said decision sets up a precedent in complete departure from the general practice followed by Courts of Law so far, and, therefore, requires adjudication at

the highest level.

8. The decision has the widest possible application as it will henceforth regulate and direct the procedure in all classes of criminal cases—Summons and warrant cases and those triable by Sessions Courts. By reason of this universal application alone, its extraordinary importance in judicial administration cannot be exaggerated, nor can its gravity in application be over-estimated. An authoritative pronouncement on the point by the highest judicial tribunal in the land would be, therefore, most appropriate, and in absolute fitness of things so as to ensure uniformity of administration of criminal justice.

9. That the special Magistrate's said order which this Hon'ble Court has upheld has caused gravest prejudice to the accused and jeopardised their rights guaranteed by law.

10. That the Magistrate's order conceding the right to Prosecution to open their case in the absence of any facts or material on record is bound to prejudice the mind of the Court and vitiate the atmosphere against the accused.

11. The said order of the Hon'ble High Court precluding as it does the accused from cross-examining the complainant at this stage as to be alleged facts. militates against the principle of a fair trial.

12. That the right of address allowed to the complainant's counsel at the enquiry stage without any similar right of reply by the accused further offends against right of equality before law and equal protection of the law as guaranteed by the Constitution.

13. That the said address can only comprise of one-sided version based purely on investigation by the Prosecution without any judicial material before the Court, which again offends against the basic principles of justice.

14. That the decision of Hon'ble Court has conceded the right of address in favour of the Complainant's Counsel on the basis of law of agency. The application of the principle of agency in the circumstances of the case militates against the

principle of criminal jurisprudence.

15. That the said order having conferred on th Complainant's counsel a right recognised by law only in favo of Prosecutor at the trial stage and not at the enquiry stage h further violated the right of the accused to be tried in accord a nce with the procedure established by law.

16. That the interpretation given by the said ord has rather made a new law than merely expounded the existi law, which, in total effect, violates principles of justice, equi as well as the law and the Constitution.

17. That the special Magistrate in his said order furth committed gross violation of the universally established princip of law of procedure, by failing to dispose of the issue o applicability of section 207-A of the Cr. P. C, prior to h application of S. 208 (1) of that code. This issue is still pending before the Magistrate, and this has further violated the funda mental rights of the accused.

18. The facts set out above indicate the gravity of the issues involved, and substantial importance of the various aspects of the matter in question. The points raised, therefore, are most appropriate for a final pronouncement by the Hon'ble Supreme Court as the highest judicial authority in the land.

19. The applicant No. 4 is one of the accused in the conspiracy case pending before the said Special Magistrate and has now joined as a petitioner in this application.

PRAYER

1. The applicants pray that in the interests of justice a certificate of fitness to appeal may be granted by this Hon'ble Court under Articles 132 (1) and 134 (1) (c) of the Constitution of India.

2. They further pray that this Hon'ble Court may kindly be pleased to stay the proceedings in the lower court pending disposal of this petition.

1. Mirza Mohd Afzal Beg.
2. Ghulam Mohd. 'chicken'
3. Mohi-ud-Din.
4. Ghulam Mohi-ud-Din Shah.

Special Jail, Jammu:
6th February 1959.

The High Court of Jammu and Kashmir.

Present :—
The Hon'ble Janki Nath Wazir, Chief Justice
and
The Hon'ble Syed Murtaza Fazl Ali, Judge.

MIRZA MOHD. AFZAL BEG AND OTHERS
versus
State of Jammu and Kashmir and another.

Application No. 2 of 1959 seeking leave to appeal to the Supreme Court.

Petitioners present in person.

M/s G. S. Pathak, Jaswant Singh, Nageshwar Prasad, G. N. Dixit, Surrinder, I. D. Grover, R. K. Kaul, Suraj Parkash and Vidya Sagar for the respondents.

This is an application preferred by four petitioners seeking leave to appeal to the Supreme Court against the order passed by this Court dated the 29th January 1959.

A preliminary objection is raised by the Counsel appearing on behalf of the State that the order passed is not a final order but is only an interlocutory order and, therefore, the application seeking leave to appeal cannot be maintained. In support of this contention reliance is placed on a ruling of the Federal Court reported as S. Kuppuswami Rao Vs. The Governor General of India, A. I. R. 1949 F. C. I, in which it has been held as under :—

The words "judgement or final order" used in S. 205 (1) impart jurisdiction to the Federal Court to entertain appeals both in civil and criminal matters. As the same words give jurisdiction to the Court in both classes of cases, it will be improper to construe them in a certain way when applicable to appeals in civil matters and give them a wider meaning when considered in connection with appeals from criminal proceedings.

"Final order" must be an order which finally determines the points in dispute and brings the case to an end.

To constitute a final order it is not sufficient merely to decide an important or even a vital issue in the case, but the decision must not keep the matter alive and provide for its trial in the ordinary way.

In a criminal case, the expressions "Judgement or final order" cannot cover a preliminary or interlocutory order made on a preliminary objection such as want of sanction under S. 197, Criminal P. C.

Mr. Beg, after reading this judgement, has frankly conceded that the order is an interlocutory one and he, therefore, did not press this application.

This application is, therefore, dismissed.

Sd. J. N. WAZIR,
Sd. S. Murtaza Fazl Ali.

Jammu:
25-2-1959.

In the Court of Special Magistrate, Jammu.

STATE *vs* MIRZA MOHD AFZAL BEG AND OTHERS.

The applicants beg to submit as under :—

1. That the Prosecution have delivered their opening address forenoon which they had always averred that it was for the benefit of the accused.

2. The accused requir a copy of the said address of the Prosecution.

3. It is requested that a copy of the said address of the prosecution be supplied to the accused at the earlist.

Sd. MOHI-UD-DIN.
Sd. GULAM MOHAMMAD.

Special Jail, Jammu.
Dated 14-3-1959.

بعدالت سپیشل مجسٹریٹ جموں

سرکار والا بنام مرزا محمد افضل بیگ وغیرہ

جرم 121 (الف) و 120 (ب) رنبیر کوڈ بحوالہ رول 32 سیکورٹی رولز و رول 32

صاحب من

مقدمہ عنوان بالا میں شری جی- ایس- پاٹھک فاضل وکیل سرکار نے بتاریخ 17 مارچ 1959 "استغاثہ" کی جانب سے عدالت میں افتتاحی ایڈریس پڑھا جسکی نقل باوصف استدعا ملزمان کو نہیں دی گئی- ان نوٹس (notes) کی نقل ڈیفنس کو مہیا کی گئی جو بدوران ایڈریس عدالت نے لئے- سائل لانگ ہینڈ (long hand) ایڈریس کے دوران نوٹس لیتا رہا- اور بعد ازاں ان کو باقاعدہ لکھکر مرتب کیا گیا- جس کی دو نقول لف ہذا گزارش خدمت ہیں- مودبانہ عرض داشت ہے کہ مشمولہ ایک نقل محترم پاٹھک صاحب کے پاس بھیجکر اُن کی تصدیق (confirmation) کرانے کے بعد سائل کو واپس کی جائے- دوسری نقل بمہربانی عدالت کے مرتب کردہ نوٹ کے ساتھ مقابلہ اور ضروری صحت کرنے کے بعد واپس فرمائی

اوے - عین نوازش ہوگی-

مورخہ 19 مارچ 1959 (سپیشل جیل جموں)

عرضےنیاز

1. پیر محمد افضل شاہ مخدومی ملزم (دستخط بحروف اُردو)
2. پیر محمد مقبول جدگامی ملزم (دستخط بحروف اُردو)
3. پیر عبدالغنی ملزم (دستخط بحروف اُردو)
4. پیر محمد نظیر ملزم (دستخط بحروف اُردو)

Office Report
Sd. N. K. HAK,
Special Magistrete,
J. and K. Jammu.

Office of the Special Magistrate, J & K, Jammu.

No :- 792/ S. M. *Dated :- 20-3-1959.*

In view of office report these may be returned to the petitioners. This course is not warranted by any provision of law or procedure.

Sd. N. K. Hak
Special Magistrate,
J & K, Jammu.

CHAPTER IV.

In The Court of the Special Magistrate, Jammu.

STATE *vs.* MIRZA MOHD. AFZAL BEG & OTHERS.

Under Section. 121- A etc. of R. P. C.

The applicant submits as under :—

1. The issue raised by the accused that inquiry against them pending in this court is governed by Sec. 207- A of the Cr. p. C. and not by S. 208 of that code has not been disposed of by the court so far. The court has also reserved judgement on the questions whether Act 42 of 1956 is in force in the staff or not.

2. Yesterday while the applicants were examining the file of the case in the court room, they read through the order of the Hon'ble High Court given by Hon'ble Justice, Syed Murtaza Fazal Ali, on the transfer application of Sheikh Mohammed Abdulah one of the accused.

3. His lordship in the said Urdu on page 14, referring to the above issue has said.

> ".....I might mention here that apart from the fact that the amended Code of Criminal Procedure applied or not, it is manifest from a perusal of Sec. 207-A that it would apply only to cases which are instituted on a police report and not on a complaint. The lagislature has not at all touched the provisions of Sec. 208, Cr. P. C. in cases where proceedings are instituted on a complaint. In the present case the proceedings against the petitioner were instituted on a complaint filed by the Inspector General of Police and not on a police report.

4. As would be apparent, His Lordship has clearly pronounced on the issue still pending decision before this court.

5. On 31-1-59 when this court announced that the record of the case had been received back from the Hon'ble

High Court, this court must have used the above order and also noted the observations quoted above.

6. The applicants need hardly point out the prejudice caused to them by the said premature pronouncement and its effect on the proceedings.

7. His Lordship was aware of the issue pending before this court, as per para 22 (V) of the transfer application the fact had clearly been brought out by Sheikh Mohd. Abdulla and His Lordship has examined and discussed that paragraph as well.

8. The applicants are approaching the Hon'ble High Court for the redress of the prejudice caused and therefore pray to this Court that it may be pleased to defer its pronouncement on the issue of the applicability or otherwise of Sec. 207-A or Sec. 208 of Cr. P. C.

Special Jail, Jammu:
Dated 5—2—1959.
2 P. M. Sd. 1. M. A. BEG.
2. GHULAM MOHD. CHIKKEN.
3. MOHI-UD-DIN.

Office of Supdt. Special Jail
No. 437/ S. J. J. Jammu 5- 2- 1959.

Forwarded to the Special Magistrate Jammu for the disposal.

Sd. BOOTA SINGH.

In the High Court of Judicature, Jammu & Kashmir State, Jammu.

1. Mirza Mohammad Afzal Beg S/o Mirza Nizam-ud-Din, Sarnal, Anantnag.
2. Ghulam Mohammad Chikkan S/o Kh. Abdul Aziz Butt, Karan Nagar, Srinagar, Kashmir.

3. Mohi-ud-Din S/o Abdullah Joo, Kadipora, Anantnag, Kashmir ... ... Applicants

versus

1. State of Jammu and Kashmir.
2. Inspector General of Police, J & K State, Shri D. W. Mehra, I. P. .. .. Non- Applicants

Application U/S 561-A, Cr. P. C.

May it please your Lordship :—

The application showeth :—

1. The applicants along with twelve others are facing inquiry U/S 121-A, 120-B (R. P. C.) R/W R. 32 of Jammu and Kashmir Security Rules and R. 32 of the said Rules in the Court of Shri N. K. Hak, Special Magistrate, Jammu.

2. On 15-12-1958 Sh. Mohd. Abdullah, one of the accused in the case, filed a transfer application before the Hon'ble High Court praying for the transfer of the case from the Special Magistrate's Court to a Court of Competant Jurisdiction.

3. When the proceedings regarqing the transfer applicatlon were going on in the Hon'ble High Court, two issues viz. (a) whether Act XLII of 1956 is in force in the State and (b) whether the inquiry before the Special Magistrate is governed by S. 207-A or S. 208 of Cr. P. C., were pending before the learned Special Magistrate who has not passed any orders thereon till today.

4, In the High Court, the said application was heard and disposed of by Hon'ble Mr. Justice Syed Murtaza Fazal Ali on 29-1-1959 and a copy of the Judgement was received by the petitioner yesterday.

5. In the body of the Judgement on the said transfer application, His Lordship referred to the issue mentioned in para 3 (b) above, and remarked :

".....I might mention here that apart from the fact that the amended Code of Criminal Procedure

applied or not it is manifest from a perusal of S.207-A that it would apply only to cases which are instituted on a police report and not on a complaint. The Legislature has not at all touched the provisions of S. 208 Cr. P. C. in cases where proceedings are instituted on a complaint. In the present case the proceedings against the petitioner were instituted on a complaint filed by Inspector General of Police and not on a police report....." (Page 14 of the Judgement).

6. The petitioner in the said transfer application at para 22 (v) had clearly submitted that the contention of the accused before the learned Magistrate is that the inquiry is governed by S. 207-A and not by S. 208 of Cr. P. C.

7. His Lordship, though being aware of this contention, made the remarks quoted in para 5 above.

8. By making the said remarks His Lordship gave a clear pronouncement on the merits of the issue still pending before the learned Magistrate, which has naturally seriously prejudiced the accused, and caused great embarrassment.

9. The said pronouncement has further caused grave prejudice and injury to the defence, as in the event of the learned Magistrates finding on the said issue being against the accused, they could have sought legal redress from the Sesssions Court and even from the Hon'ble High Court in a proper legal process. The pronouncement has further jeopardised that redressal.

10. In these circumstances the applicants pray that the Hon'ble Court may kindly be pleased to expunge the said remarks and order such further relief as the Hon'ble Court may deem fit to secure the ends of justice.

Sd/- M. A. BEG,
GULAM MOHD. CHIKKAN,
MOHI-UD-DIN.

Special Jail, Jammu :
Dated 5-2-1959.

High Court of Judicature, Jammu and Kashmir.

Present :
The Hon'ble Syed Murtza Fazl Ali, Judge.
Criminal Miscellaneous No, 105 of 1959.
MIRZA AFZAL BEG & OTHERS
versus
STATE OF JAMMU AND KASHMIR AND ANOTHERS.
Application under section 561-A, Cr. P. C.
Petitioners in person.

ORDER.

Heard Mr. Beg at length. In my opinion no case for expunging the observations complained of has been made out. I would, however, make it clear that as these observations were made incidentally in connection with an argument put forward in the transfer application, they would not, in any way, prejudice the decision of the main question as to the applicability of Act XLII of 1956 to the proceedings pending against the petitioners before the Special Magistrate. With these observations this application is summarily dismissed.

Sd. Syed Murtaza Fazl Ali.

Jammu :
19th February 1959.

CHAPTER V

In the court of Special Magistrate, Jammu.

STATE *vs.* MIRZA MOHD. AFZAL BEG & OTHERS.

[Presented by Mr. M. A. Beg. Sd. N. K. Hak. 31-1-59.]

The applicant submits as under :—

1. This court at the earliest opportunity after the accused were brought before it ordered on 11-6-58 that the prosecution produce all the documents on which they rely in the case.

2. That the prosecution, without questioning the said order in a legal process, contended quite a few months after the said order under section 208 Cr. P. C. they were not bound to produce the documents. The accused, however, have been pressing for the early productions of the documents, as the enquiry is governed by sec. 207- A, Cr. P. C. and not by S. 208 of that Code. The said order of this court regarding early production of documents, not having been legally questioned and set aside, has become final.

3. That the accused applicants further pressed their request through a reminder application on 28-11-58 for the early production of the documents and on 29-11-58 the applicants argued against the belated contention of the prosecution that Act XL11 of 1956 was not in force. The court, however, reserved its judgement.

4. The applicants, therefore, pray that after the disposal of the said issue the court be pleased to compel the prosecution the compliance of its order of 11-6-58 regarding early production of documents in the case.

Special Jail, Jammu :
Jan. 31, 1959.

1. MOHI-UD-DIN.
2. M. A BEG.
3. GHUIAM MOHD CHICKEN.
4. MOHI-UD-DIN SHAH.
5. ALI SHAH.
6. SOFI MOHD. AKBAR.
7. MOHI-UD-DIN.
8. PIR ABDUL GANI.

This is an application filed on behalf of 8 accused persons requesting to direct Prosecution regarding early production of documents in the case. Similar applications are pending decision and therefore this application may also be put up along with those applications on the date fixed in the case i. e. 7th Oct.

Announced.
31-1-1959.

Sd. N. K. HAK,
Special Magistrate.

Petitioners and counsel for prosecution present.

Two similar petitions which were pending decision were disposed of today by a single order. That order pertaining to production of documents by Prosecution will govern this petition also. It was neither moved nor argued.

This may therefore be filed.

Annouuced.
7-2-1959.

Sd. N. K. HAK,
Special Magistrate.

In the Court of Mr. N. K. Hak, M.A, LL.B., Special Magistrate, Magistrate 1st Class, J & K, Jammu.

Cr. File No : 1 of 1958.
Date of institution 21-5-1958. Date of decision pending.
STATE *Vs.* MIRZA MOHD. AFZAL BEG AND OTHERS.
Under Section 121–A, R.P.C. etc.

Application dated 28–11–59 filed by Mirza Mohd. Afzal Beg and 13 other accused and Mr. Mohd. Latif Advocate, decided on 7–2–1959.

Present :—Counsel for the Parties.

Accused excepting M/s Amin and Hamdani in person.

ORDER.

This is an application filed by Mirza Mohd. Afzal Beg and 13 other accused requesting that prosecution may be ordered to produce documents without any further delay.

A similar application has been filed by Mr. Mohd. Latif.

Reference has been made to court order dated 11-6-58 and it has been stated that inspite of so much time having elapsed prosecution has been deliberately avoiding to do so and this undue delay is seriously operating to the prejudice of the accused and further delay is seriously jeopardising the rights of the accused guaranteed by law.

A similar point is involved in both the applications and therefore both applications are taken up simultaneously.

Mr. Beg argued this at great length. During arguments he raised two points :—

1. The inquiry proceedings pending before the court were governed by the provisions of Section 207-A of the Code of Criminal Procedure-Act XLII of 1956. It is that section which will apply to the case.

The documents dated 21-5-1958 filed by Inspector General of Police (i.e. Complaint) instituting these proceedings, being a "Police Report".

2. Clause 2 of Sec. 1 of Act of 1956—Code of Criminal Procedure (Amendment) Act 1956, is ultra vires of Jammu and Kashmir Constitution Act of 1996.

His argument in short amounted to that Act XLII of 1956 is in force in State inspite of the "Commencement-Clause" referred to above and that Sec. 207-A of Code of Criminal Procedure of that Act and not Sec. 208 of Cr. P. C. would apply to these proceedings.

Before going into this matter it would be to the advantage to refer to the record.

The Record discloses that Sh. D. W. Mehra, Inspector General of Police filed complaint against Mirza Afzal Beg and

others in this court on 21-5-58. A supplementary complaint against Sheikh Mohd. Abdullah was also filed by him on 23-10-1958. Various objections were raised on behalf of the accused in respect to the inclusion of Sheikh Mohd. Abdullah to the schedule of accused in this case and those applications were disposed of by the order of this court dated 29-11-58 and the objections overruled.

Mr. Beg has tried to show that this complaint is nothing but a police report and has referred to F. I. R. 100 mentioned in the complaint and also other cases arising out of "explosions" referred to therein.

A mere mention of the courses in the complaint of disclosing facts cannot in itself make this complaint a report. The record will disclose that from the very inception of these proceedings the court has treated and taken this as a regular complaint, which it obviously is. Much has been made of Para 15 of the complaint which reads :—

"It is submitted that in relation to the offence under Rule 32 of the Security Rules, this may be treated as a report of the facts constituting the contravention of the said Rule in accordance with Rule 136 thereof".

But even this cannot possibly make the complaint a police report and the complaint as it reads can be construed as nothing else but a regular complaint is Section 121-A., R. P. C.

In supporting his contention that it is a police report and not a complaint Mr. Beg has referred to amendment of Sec. 204 (IB) as per Act XLII of 1956 which says that in a proceeding instituted upon a complaint made in writing, every warrant issued under Sub-sec. (1) shall be accompanied by a copy of such complaint. By this Mr. Beg tried to point out that as warrants issued in this case were not accompanied by copy of the complaint, therefore, the court has not taken it as a 'complaint but a 'Report'. He has further referred to Sec. 200 (b), Cr. P. C. in which examination of a complaintant has been deemed not necessary when a complaint is made in writing by a public servant in the discharge of his official duties. He has

tried to make out that in this case Inspector General of Police has been cited as complainant so according to him the complaint is nothing but a police report

The provision of amendment of Sec. 204 as per 204–B can only apply in case the amended code i. e. Act XLII of 1956 is held to be in force and the very fact that warrants issued were not accompanied by a copy of complaint shows that the amended code has not been applied to these proceedings. Besides, in this case Government has accorded sanction to prefer complaint against persons specified in the schedule and has authorized Sh. D. W. Mehra, Inspector General of Police, to prefer the same in the court which he has done.

The Government could have authorized any public servant also to do it and the mere fact that the person so authorized happens to be Inspector General of Police that fact alone cannot in itself make it a police rebort.

Reference to the provisions contained in sec. 173 of the amended code is also not relevant to this case. In this complaint fact constituting the offence have been set out and all that is essential in a complaint is contained in. It can under no stretch of imagination be construed as a Police Report. It has been made to the court with the intention and the object of setting the criminal law in motion against the persons against whom complaint is directed. It is, therefore, nothing but a regular complaint. Even if it is assumed that amended Code of Criminal Procedure applied. Section 207-A of the Code cannot apply to this because, proceedings in this case have been instituted on a complaint and not on a police report.

Mr. Beg has referred to a letter from the Law Department regarding the appointment of undersigned as Special Magistrate in which it has been stated that concurrence of Hon'ble Chief Justice has been obtained in the appointment. Mr. Beg has argued that this also indicates that amended Code of Criminal Procedure is in force and has been followed in this case as envisaged by the Amendment of Sec. 14 in which words "in consultation with the High Court" occur. The undersigned was

working as Judge, Small Causes Court, Srinagar, in the Judicial Department and had to be relieved from that post to join as Special Magistrate appointed under sec. 14 of the Criminal Procedure Code, which could only be done under orders of Hon'ble the Chief Justice. In this connection, it may not be out of place to mention that Hon'ble Chief Justice alone does not constitute the High Court, and this concurrence referred to in the above letter can in no case in itself connote that it has been done under the provisions of the amended Code. That at best is an administrative formality.

In support of his contention Mr. Beg has drawn our attention to the front page of Jammu and Kashmir Laws in which it has been written that those being a collection of State enactments in force in the Jammu and Kashmir State. He has further stated that in Vol. II, Criminal Procedure Code as amended by Act XLII of 1956 has been incorporated and all amendments have been shown therein. This according to him support his argument that this amended code is in force in the State because, had it not been so then, this Act would also have been shown in the addendum as has been the case with the Amendment Act No. XXVII of 1957. I am afraid this argument of Mr. Beg cannot be accepted. There is a slip attached with this part of Criminal Procedure Code to the effect that amendments made in the code of Criminal Procedure 1969 have not as yet been enforced. Besides, legislation has in this case delegated authority conditionally to the executive as per clauses 2 Sec. 1 of the Amended Act. The bill has received assent of Sadar-i-Riyasat in the form in which it has been passed by the Legislature and therefore it has to be taken in the same form in which it has been passed and has received assent. It shall have the force of law as intended by legislature only at the time when the delegated authority may choose to appoint as per this sub-clause under the authority delegated to it by the legislature. This brings us to the matter of the conditional legislature which will be discussed at the appropriate place.

Therefore, if through the inadvertance of some officer

in the Law Department of the concerned officer in charge o the compilation of laws the amendments have been incorpo rated in the Criminal Procedure Code shown in the compile laws of Jammu & Kashmir Laws Vol. II then, that in itself cannot give it force of law and cannot override the delegatio conditionally conferred by the legislature on the authori specified therein and also against the very intention of th legislature as contemplated in the Act itself.

Clause 2 of Section 1 of the Amended Act says :—

"It shall come into force on such date as the Govt. may by notification in the Govt. Gazette, appoint".

The contention of Mr. Beg is that this is ultra vires o the Constitution and that inspite of this according to Consti tution Act of 1996, the Amended Act has come into force. He has argued that the Amendment Act has been passed at a time when the Jammu & Kashmir Constitution Act 1996 (Act XIV of 1996) was in force. He referred to Art. 31 (3) of th Constitution and argued on the basis of that sub-clause that th present amending bill has been assented to by the Sadar-i Riyasat and has been published in the Official Gazette and as such it has come into operation from the date when it ha been published in the official Gazette. He further argue that restrictive clause in Sec. 1 (2) of that Amending Act whereby the time of commencement of the said Act has been left with the executive administration is ultra vires Art 31 of the Kashmir Constitution. In his arguments he drew analogy of Art. III of Indian Constitution and stated that the said Art in the Indian Constitution does not specify about the publica cation of the enactment assented to by the President and the words "shall declare", assent, are significant and have been deliberately inserted in that Art. but this clause in Art. 31 Kashmir Constitution makes intention of the legislators clear that once a piece of legislation has been assented to by the Sadar-i-Riyasat and is published in the official Gazette, it comes into force regardless of the fact even if specified provision has been made in the legislation itself indicating time and manner

of carrying the legislation into effect. By such a construction Mr. Beg does not appear to bear in mind fundamental concept of legislation. It cannot be denied that legislature is the supreme authority so far as legislation is concerned as it gets its authority from the people. Even the constitution gets sanction from the legislature when it is embodied in the shape of an Act. In Indian Constitution once a piece of legislation is assented to by the President, it becomes a Statute or law and the date of the enforcement of the Law is the date of the assent provided that when there is nothing in the Act itself, while the legislature in its wisdom intended that the operation of the Act would be deferred and left that portion to the administrative convenience.

Article 23 of Act of 1996 (Kashmir Constitution) almost corresponds to Art. 245 of the Indian Constitution. That really defines the legislative power of a legislature with limited competence. If the legislature kept itself within the bounds of that section it cannot be said that it has exceeded its authority. A piece of legislation or particular section of an Act would only be ultra vires of the Constitution, if the legislature has exceeded its power given in Art. 23 of the Constitution. Unless it is apparent that the legislature has travelled outside limitations laid down in the Constitution, the court will not pronounce a Statute or a Sec. of the Statute ultra vires. While construing an enactment of a legislature with limited competence (as per Art. 23) the court must presume that the legislation in question knows its limits.

We have therefore to see what are limitations in exercise of this power of legislation of a legislature. The limitations are that it cannot delegate its power of legislation to anybody else. If it does that, then so far as that delegation is concerned, it will be ultra vires and illegal.

This brings us to as to what is delegation of legislative power. It will be needless to give in detail instances of delegation of legislative power but it would be sufficient to state that legislature cannot delegate its essential functions—the essential

legislative functions. The essential legislative functions are :—

(a) Determination of the legislative policy; and

(b) Its formulation as a rule of conduct.

In other words, the legislature cannot delegate to another agency the exercise of its judgement on the question as to what the law should be. The power to modify an Act in its essential particulars is an essential legislative function. It follows, therefore, that the conferment of the power on the executive to modify an Act without any limitation on the power to modify an Act constitutes an unconstitutional delegation of legislative function, because in making the modification the whole aspect of an Act or a secttion may be changed.

The functions which may be delegated and which will not constitute delegation may be summarized as under :—

1. Where the legislature lays down the policy and does no more than cnable a duly authorized officer or agency to meet cotingencies and deal with various situations that may arise, it is not delegation of legislative authority. For legislature cannot see or provide for future contingencies.

2. There is no unconstitutional delegation of legislative power in the usual "removal of difficulty" clause.

3. The power to extend operation of the Act may be delegated.

4. There is no unconstitutional delegation where the legislature permits executive, at its direction to adopt existing statutes and to apply them to new area.

5. Once the essential legislative function is performed the legislature by declaring its pclicy, the extent of delegation is a matter for the discretion of legislature and the court is not competent to say that legislature should have not gone beyond a certain limit.

Both the Union Parliament and the State Legislature have within their constitutional limits, plenary powers of

legislation. It may exercise its legislative authority either absolutely or conditionally. In the latter case leaving to the discretion of some external authority tne time and manner of carrying the legislation into effect, as also the area over which it is to extend. So long such delegation of power does not change the essential policy of the legislature itself, it cannot be said that the delegation of power is unauthorized or illegal.

Let us now examine what is the case here :—

By Section 1 clause 2, legislature has kept only to the discretion of some external authority, the time and manner of carrying out the legislation. It has given that authority discretion about the time which it may appoint for its enforcement. Such a delegation cannot be illegal and legislature is undoubtedly within its campetence to exercise its legislative authority conditionally. Sometimes it may be necessary that to give effect to a piece of legislation, entire administrative machinery has to geered to meet the contingency and for such cases conditional legislative enactments are made. If this clause of the amended Act by itself changed the essential features of the Act itself or changed the legislative policy for which it had been enacted, that would have been ultra vires.

As would be clear from the Act that by tne insertion of this clause in the Act there has been effected no change either in the essential features itself or in the legislative policy for which it has been enacted. It has been simply left to the executive authority namely Government, to give effect to this piece of legislation by choosing the time it may appoint for its enforcement by notification in the Government Gazette. This conditional legislation is recognized both by the Indian Parliament and State Legislature and in fact this is well recoganized even in American Constitution.

Conditional legislation and the limit to which it can go and is permissible has been enunciated and discussed in many cases both by Supreme Court and High Courts in India. It is not necessary to refer to all those cases. A reference to a few reported as A. I. R. 1951 Supreme Court, Page 747, A. I. R.

1952 Supreme Court, page 252, A. I. R. 1954 Supreme Court, page 569 and A. I. R. 1957 Supreme Court, page 510, A. I. R. 1954 Bombay 397 and A. I. R. 1956 Patna 188 will suffice to indicate the extent to which conditional legislations can go and are permissible and also the test to determine the competence of the legislation to make such delegations conditionally.

A glance at the cases referred to by Basu in Commentary on the Constitution of India, Vol II, under Head "Conditional Legislation" at pages 244-46 will also show the extent to which this delegation can go and judging from those standards it is manifestly clear that this clause in the Amended Act has not gone beyond these limits and is strictly within limits of the competence of legislative authority conditionally and such a conditional legislation is within its competence and this clause 2 of section 1 of the Amended Act is not, therefore, ultra vires of Constitution.

Coming to the question of production of documents and in order to appreciate various orders passed in respect of this matter, it seems necessary to refer to various orders passed from time to time on the applications and submissions of the accused. On the applications of the accused for summoning of documents, prosecution was dircted on 11-6-58 to produce all the relevant documents pertaining to case as soon as possible and counsel for prosecution was directed to see that it was done as early as possible. The counsel for the accused felt satisfied with that order. This matter was further agitated as per petition dated 9-7-58 when after hearing both parties at length that petition was disposed of on 24-7-58. It was observed in that order.

".....So for as the question of documents is concerned it has been argued on behalf of Prosecution that distinction has to be made with respect to filling of documents in civil and criminal cases and that it is not incumbent upon the Prosecution to file documents along with the complaint and that Prosecution will produce the required documents at the proper stage and when they produce and prove these, the defence

will be entitled to examine them. I see force in this contention on behalf of Prosecution. The defence shall of course have to be afforded reasonable facilities to examine documents when produced and proved on behalf of Prosecution.

Later this matter has again raised by Mr. M. L. Anand Counsel for Mir Ghulam Rasul accused on 24-10-58 when, court relying on case Munshi Singh *versus* State reported as A. I. R. 1953 Allah. 197 did not agree with the contention of Mr. Anand. This point has been discaussed in that order and for the sake of convenience that is repeated here:—

".... Mr. B. L. Anand Counsel for Mir Ghulam Rasul accused submitted that the accused my be supplied with the list and the copies of the documents. He was not able to cite any provision of law under which Prosecution could be asked and was bound to produce documents relied on at the first hearing or when the other party desires them to be produced. He also could not cite any case of law in support of his contention. Mr. Mitter Counsel for Prosecution opposed this submission of Mr. Anand. He argued that amendment to criminal paocedure is not in force in the State and that Prosecution can produce documents at any stage it likes, the documents can come on record only when they are duly proved and it is only when the witnesses proving the record are examined, the stage for the documents coming in on record is reached. He has further argued that accused cannot force production of documents at any stage. This argument of Mr. Mitter gets support from the case Munshi Sing *vs* State reported as A. I. R. 1953 Allah. 197 and as such the contention of Mr. Anand cannot prevail".

It has been held in Munshi Singh *vs* State referred to above that :-

> "Section 208 (3) Criminal Procedure Code cannot be interpreted to mean that the accused can demand the production of any document whenever he feels the necessity of referring to it. The sub-section empowers the Magistrate to compel the summoning of such witnesses and the production of such documents which

the prosecutor or the accused wants to produce before the court in support of the case. The provision cannot be taken to give a right to either of the parties to compel the other to produce any witness or document on the mere request of the other party."

This view has latter been followed in another case of the same High Court in Salek Chand *vs* State [A.I.R. Reporter 1955 Allah. N.U.C. 1937] which reads :—

"The documents which require to be proved can lawfully come on the record only when the witnesses who prove them are examined. Clause (3) of S. 208 does not give a party the right to compel the other party to produce any document merely on its request. An accused person, therefore, cannot ask for the production of documents on the ground that they are necessary to enable him to effectively cross-examine prosecution witnesses. If he satisfies the court that it is necessary to put further questions to certain witnesses, the court has power to recall those witnesses and to have cross-examined them in respect of those questions. An accused person is vested with only those rights which have been given to him explicitly or impliedly by the Code."

All this will disclose that inspite of this matter having been agitated and decided more than once, the matter has again been agitated by the accused. This was also urged as one of the grounds in Transfer Petition of Sheikh Mohd. Abdullah, (Transfer Petition No. 94 of 1958) and in that Hon'ble Mr. Justice Ali while delivering his judgement dated 22-1-1959 was pleased to observe at page 11 of his judgement :—

".....It is not necessary in this petition to decide the question asto whether the amended Code of Criminal Procedure has been made applicable or not, because Mr. Mani has argued on the assumption that even under section 208 Cr. P. C. the Prosecution should have produced the documents. A persual of sec. 208 Cr. P. C. clearly shows that there is no provision

which requires the Magistrate to compel the prosecution to produce the documnets even before the prosecution starts adducing its evidence. He has, however, in fairness to the accused passed an order on 11-6-1958 directing the prosecution to produce the documents and if the prosecution do not choose, for some reason or other to produce the documents, they could not be compelled to do so unless there was any provision of law compelling them to produce the same."

As already stated above, I am of opinion that Act No. XLII of 1956, Code of Criminal Procedure (Amendment) Act 1956, is not in force and clause 2 Sec. 1 of the Amended Act is within the competence of legislature and is not ultra vires the Constitution i. e. Art. 31 clause 3 of Jammu and Kashmir Constitution Act of 1996 (Act No. XIV, 1996).

The question of Sec. 207-A applying to these proceedings cannot, therefore, arise and proceedings in this case are, governed by Sec. 208 of Criminal Procedure Code which applies to this case.

The Hon'ble High Court has in order dated 29-1-59 (Criminal Reference No. 48 of 1958) been pleased to uphold the order of this Court dated 1-12-1958 granting prosecution right to address the Court on facts of the case in these proceedings under the provisions of Section 208 (1) Cr. P. C.

Even in the amended code legislature has not touched the provisions of Section 208 Cr. P. C. in cases where proceedings are instituted on a complaint.

Inspite of clear law on this point the Court in fairness to the accused passed order on 11-6-58 directing the prosecution to produce documents as indicated in that order, later inspite of seeing force in the contention of prosecution it observed in the order dated 24-7-1958 that the defence shall of course have to be afforded reasonable facilities to examine documents when produced and proved on behalf of Prosecution. This is the utmost Court could do and the utmost to which it can go in this respect. Prosecution cannot be compelled to produce docu-

ments unless there was any provision of law compelling them to do so.

For the reasons stated above, I have come to the conclusion that Act. No. XLII of 1956, Code of Criminal Procedure (Amendment) Act 1955, is not in force in the State and clause 2, Section 1 of Amended Act is within the competence of legislature and is not ultra vires the constitution i.e. Art. 31 (3) of Jammu and Kashmir Constitution Act of 1996 (i. e. Act XIV of 1996) and therefore, proceedings in this case are governed by Section 208 Cr. P. C. of 1989 which applies to this case and these proceedings pending before the court are not governed by provisions of Section 207-A of Criminal Procedure Code (Amendment) Act 1956 (Act No. XLII of 1956) which Act is not in force in the State and has not as yet been enforced.

There was no provision of law compelling Prosecution to produce documents at this stage in these proceedings and it is not possible to order and compel Prosecution to produce documents in these proceedings at this stage of inquiry, or go beyond the observations already made in order dated 24-7-1958 in this behalf.

These applications cannot be accepted and are, therefore, rejected.

Announced.
7-2-1959.

Sd. N. K. Hak,
Special Magistrate,
Magistrate Ist Class,
Jammu and Kashmir,
Jammu.

In the Court of Sessions Judge, Jammu.

Institution : 21-2-59, *Decesion : 28-2-59.*

1. Mirza Mohammad Afzal Beg s/o Mirza Nizam Beg, Sarnal, Anantnag.
2. Kh. Ghulam Mohammad Chikkan s/o Kh. Abdul Aziz Butt, Karan Nagar, Srinagar.

3. Mohi-ud-din s/o Kh. Abdullah Joo, Kadipora, Anantnag.
4. Ghulam Mohi-ud-Din Shah s/o Kh. Ali Shah, Bagh Magharmal, Srinagar. .....Applicants

Versus

1. State of Jammu and Kashmir.
2. Inspector General of Police, Jammu and Kashmir State, Shri D. W. Mehra, I. P.
3. Sheikh Mohammad Abdullah s/o Sh. Mohammad Ibrahim, Soura, Kashmir.
4. Kh. Ali Shah s/o Kh. Ahmed Shah, Bagh Magharmal, Srinagar.
5. Mirza Ghulam Qadir Beg s/o Mirza Nizam Beg, Sarnal, Anantnag.
6. Mir Ghulam Rasool s/o Mir Ahmad Shah, Raj Bagh, Srinagar.
7. Sofi Mohammad Akbar s/o Kh. Assad Ullah, Sopore, Kashmir.
8. Pir Mohammad Maqbool Yilgami s/o Pir Hussan Shah, Wilgam, Kashmir.
9. Pir Abdul Gani s/o Pir Ghulam Ahmed, Mohalla Qazi, Anantnag.
10. Mir Mohammad Nazir s/o Hussan Bux, Shaheed Gunj, Srinagar.
11. Ghulam Mohi-ud-Din Hamdani s/o Ghulam Mohammad Zohra, Hamdani, Srinagar.
12. Pir Mohammad Afzal Makdoomi s/o Ahmed Shah, Khaniyar, Srinagar.
13. Kh. Mohammad Amin s/o Amir-ud-Din Ahiguzar, Srinagar. .....Non-applicants.

Revision application against the order dated 7th February 1959 of Shri Nil Kanth Hak, Special Magistrate, Jammu.

The applicants submit as under :—

1. The non-applicants 1 and 2 have instituted inquiry proceedings in the Court of Shri N. K. Hak, Special Magistrate, Jammu, against the applicants and non-applicants 3 to 13 named above, u/s 121-A of the Ranbir Penal Code, 120-B Ranbir Penal Code R/W R 32 of the Jammu and Kashmir Security Rules and R. 32 of the said Rules.

2. In the said inquiry prosecution witnesses have not yet been examined.

3. At the very initial stage, when the accused were brought before the Magistrate, they demanded production of all documents, Police diaries, list of witnesses etc. on which the prosecution relied in this case. The Public Prosecutor conceded both the merit and the request in the defence plea.

4. The Court after hearing the parties gave a direction for the early production of the documents.

5. The prosecution used dilatory methods and protracted delay extending to several months was allowed to occur without compliance of the Court's order.

6. Finally the prosecution took the stand that as Act XLII of 1956 was not in force in the State, the defence is not entitled to ask for production of documents at the initial stage, which the accused contested.

7. Apart from the general obligation on the prosecution to produce all the documents at the earliest stage, the defence consistently took the stand that the inquiry was governed by S. 207-A Cr. P. C. and that Act XLII of 1956 (Criminal Procedure Code Amendment Act) was in full force in the State, Clause 2, S. 1 of the said Act being ultra vires of the State Constitution of 1996.

8. The learned Magistrate later on considered the following two issues after hearing the arguments of the parties :—

(a) Is clause (2), S. 1 of Act XLII of 1956 ultra vires of the State Constitution of 1996, and therefore

void and consequently in the said Act in force and operative in the State.

(b) Is the inquiry pending before the Magistrate governed by S. 207-A of the Amended Code of the Criminal Procedure or by S. 208 of the said code.

9. On 7th February 1959, the Magistrate by his order held that the said clause (2) of S. 1 of the Amended Code was ultra vires of the State Constitution and that the said Act XLII of 1956 was not in force in the State. He further held by the order of date that these inquiry proceedings were governed by S. 208 of Cr. P. C. and S. 207-A Cr. P. C. had no application. It is against the said order of 7-2-1959 that this petition for revision is submitted.

10. The said order of the learned Magistrate is wrong and incorrect in law, the conclusions drawn therein evioneous, the procedure followed improper and the decisions given on various points being unwarranted both in law and facts. The order may be quashed on the following, against other grounds :—

(i) Constitution of 1996, being paramount instrument is supreme to all laws made thereunder and therefore clause (2) of S. 1 of Act XLII of 1956, cannot prevail over the provisions of the said Constitution.

(ii) The said clause being repugnent to the letter and spirit of the constitution, is ultra vires and therefore null and void.

(iii) The said clause offending as it does Art. 31 (3) of the said Constitution, is void, *ab initio.*

(iv) That the said clause being void, Act XLII of 1956 has taken effect and is in full force in the State.

11. That the doctrine of delegated legislature as adumbrated by the learned Magistrate has neither any rele-

vance nor any application to the facts of the case in the circumstances of this matter.

12. That the theory of conditional legislation as enunciated by the learned Magistrate is also completely inapplicable to the circumstances of the case.

13. That to invoke the doctrine of delegated legislation or conditional legislation, in the circumstances of the case, would defeat the basic and unavoidable conceptive supermacy and paramountacy of the law of constitution while doing this the learned Magistrate has seriously considered.

14. That with almost respect for the authorities, cited by the learned Magistrate, the case of the defence is absolutely outside those authorities. The learned Magissrate therefore is in the wrong to draw support from those authorities to negative the defence contention.

15. That the legislature could legislate only within the limits set by the Constitution of 1996 and any transgression of these limits is ultra vires.

16. That the conduct of the inquiry shows that Act XLII of 1996 was treated in practice as being in force and therefore the belated contention that it is not so in force is only an after-thought.

17. That the inquiry is governed by Section 207-A and not by 208 of Cr. P. C. :—

(i) That behind the inquiry is investigation of Police and the case is the exclusive result of the Police investigation, however, illegal and unwarranted by law.

(ii) That the whole of the prosecution evidence so called is the result of the police investigations and police inquiries and nothing else.

(iii) That merely lebelling of the case as a "Complaint" can neither change its character nor nature as a 'police report'.

(iv) That to allow the prosecution to do this, as the learned Magistrate has done would be to give legal sanction to comonflag and circumvension of statutory provisions of law and constitution.

(v) That the effences with which the accused are charged being of diverse character and nature, the total charge cannot and is not that of a complaint.

(vi) That such a procedure as the learned Magistrate has allowed defeats the fundamental rights of the accused guarranteed by Constitution and established by law.

18. That the learned Magistrate on 1-12-1958 had also adopted wrong procedure to the detriment of the accused by applying provisions of Section 208 CR. P. C. before deciding whether that Section at all applied to the inquiry. That order also caused considerable harrassment to the accused unwarranted by law. This fact may also be considered in this application.

19. That the Magistrate by his order under revision has allowed a procedure which conflicts with the right of equality before law, equal protection in law and the right to be tried in accordance with the procedure established by law and other rights of the defence secured to them by the Constitution. It further creates an invidious discrimination against the present accused and clothes the prosecution with special privilege not countinanced by law or constitution.

20. That the said order regarding the production of prosecution documents having been final, the learned Magistrate could not revise his own order in law.

21. That any subsequent order indicated above, could only cause, as it did, harassment to the accused and afford possibilities of fabrication and concoction of evidence. This procedure further is obnoxious to the letter and spirit of the constitution.

22. That any subsequent order on production of documents, apart from being no order in law, could not and does not bind the accused applicants.

23. That various other conclusions and inferences drawn by the learned Magistrate on ancillary and incidental points in the said order are unwarranted by law, justice and good conscience.

24. Certified copies of the learned Magistrate's order of 7-2-1959 and affidavit duly attested are attached herewith.

PRAYER.

The accused respectfully pray that after calling for and examining the record of the case, the Hon'ble Court may be pleased to

(a) Set aside the order of the learned Special Magistrate dated 7-2-1959 and hold that :—

(i) Act XLII of 1956 is in force in the State, clause (2), S. 1 of the said Act being ultra vires of the constitution 1996.

(ii) The inquiry before the Magistrate is governed by S. 207- A and not by Sec. 208 of Criminal Procedure Code.

(iii) The prosecution is bound to and must produce all documents, diaries and police reports on which it relies and those connected with the case.

(b) Stay the proceedings before the Magistrate pending disposal of this application.

Special Jail, Jammu :
20-2-1959.

1. Mirza Mohd. Afzal Beg,
2. Gulam Mohd. Chikkan,
3. Mohi-ud-Din,
4. Gulam Mohi-ud-Din Shah.

In the Court of Pt. R. K. Kaul, B. A., LL. B.,

Sessions Judge, Jammu.

Date of Institution 21-2-1959. Date of Decision 28-2-1959.

1. Mirza Moh'd Afzal Beg son of Mirza Nizam Beg of Sarnal, Anantnag.
2. Kh. Gulam Mohammad Chikken son of Kh. Abdul Aziz Butt of Karan Nagar, Srinagar.
3. Mohi-ud-Din son of Kh. Abdullah Joo, Kadipora, Anantnag.
4. Gulam Mohi-ud-Din Shah son of Kh. Ali Shah Bagh, Magharmal, Srinagar. ... ... Petitioners.

versus

1. State of Jammu and Kashmir.
2. Inspector General of Police, Jammu and Kashmir State, Shri D. W. Mehra ... Respondents

Criminal Revision No. 65 of 1958–59.

Revision against the order of Shri N. K. Hak, Special Magistrate, Jammu and Kashmir, Jammu : dated 7-2-1959.

Petitioners in person ;

Shri Nageshwar Prasad, Senior Prosecution Counsel,
Shri Jaswant Singh, Advocate General,
Shri Bansi Lal Suri Public Prosecutor and
Messrs R. K. Kaul, Indar Dass, J. L. Sehgal, Suraj Praksah and Vidya Sagar ... ... for respondents.

JUDGEMENT.

This is a revision petition by Mirza Mohd. Afzal Beg and three other accused in the Conspiracy case against the order dated 7- 2- 1959 passed by the Special Magistrate

(Committing Magistrate), Jammu, on their application dated 28-11-1958 praying that the prosecution may be ordered to produce the documents on which it proposes to rely without any further delay.

Shree D. W. Mehra, Inspector General of Police, presents before the Special Magistrate a complaint for offences punishable under sections 121-A and 120-B Ranbir Penal Code read with Rule 32 of the Jammu and Kashmir Security Rules and the said Rule against the petitioners and others on 21-5-1958 and a supplementary complaint against Sheikh Moh'd Abdullah on 23-10-1958 and the Magistrate took cognizance of these offences on the aforesaid complaints. No prosecution evidence has up till now been recorded. On 28-11-1958 the petitioners made an application before the Magistrate requesting that the prosecution be ordered to produce all documents on which it proposes to rely in support of its case. The petitioner's case is that the two documents on which cognizance of the alleged offences has been taken and proceedings started against them and others by the lower court are really police reports and not complaints and that under the Code of Criminal Procedure, as amended by the Amendment Act No. XLII of 1956, the prosecution is bound to produce all documents before the commencement of the inquiry. The prosecution case, on the other hand, is that even though Act. No. XLII of 1956 has been passed by the State Legislature, it has not yet come into force because the Government has not declared the date on which it shall come into operation under Sub-section (2) of Section 1 which provides that "it shall come into force on such date as the Government may, by notification in the Government Gazette, appoint." It is further contended on behalf of the prosecution that in the Code of Criminal Proeedure as it stand at present there is no provision authorising the Magistrate to compel the production of the documents in question at this stage. The learned Magistrate has discussed the respectfve case of the parties in a lengthy and detailed order dated 7-2-1959 and rejected the contention of the petitioners. The concluding and operative portion of

the order challenged in this, revision is as follows :—

"For the reasons stated above I have come to the conclusion that Act XLII of 1956, Code of Criminal Procedure (Amendment) Act 1956 is not in force in the State and clause 2, Section 1 of Amendment Act is within the competence of legislature and is not ultra vires the constitution i. e. Article 31 (3) of Jammu and Kashmir Constitution Act of 1996 (i. e. Act XIV of 1996) and therefore proceedings in this case are governed by section 208 Cr. P. C. of 1989 which applies to this case and these proceedings pending before the court are not governed by provisions of section 207-A of the Criminal Procedure Code (Amendment) Act 1996 (Act No. XLII of 1956) which Act is not in force in the State and has not as yet been enforced.

There are no provisions of law compelling prosecution to produce documents at this stage in these proceedings and it is not possible to order and compel prosecution to produce documents in these proceedings at this stage of inquiry or go beyond the observations already made in order dated 29-7-1958 in this behalf.

It may be observed at the outset that one of the many changes introduced by the Amendment Act of 1956 is that it has laid down different procedure for inquiry proceedings instituted on a police report and for those instituted on a complaint or otherwise, whereas there is no such difference under the present Code. The main difference introduced in the case of a proceeding instituted on a police report is to be found in susb-section (3) of Section 207-A of the Code as amended by Act XLII of 1956, which is as follows :—

"At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be furnished."

Sub-section (4) of Section 173, which has been substituted

by the Act of 1956, is as follows :—

"After forwarding a report under this section, the officer incharge of the police station shall, before the commencement of the inquiry of trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of the first information report recorded under Section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under Section 164."

The petitioners insist on the production of the documents before the commencement of the inquiry on the ground that the case against them is instituted on a police report and not on a complaint. This ground, as taken in para 7 (ii), (iv) of this revision, is as follows :—

(ii) That behind the inquiry is investigation of police and the case is the exclusive result of the police investigation, however illegal and unwarranted by law.

(iv) That merely libelling of the case as a "complaint" can neither change its character nor nature as a police report. "It will be easily clear that the provisions of Sections 207-A (3) and 173 (4), as enacted by the Act of 1956 set out above, do not apply to cases instituted on a complaint but only to those instituted on a police report. There are no similar provisions relating to cases instituted on a police report in the present Code; but, on the other hand, the procedure to be followed in inquiry proceedings is the same whether instituted on a police report or on a complaint. In other words, under the present code it is immaterial whether the case is instituted on a police report or a complaint; but it is clearly not so if the case is governed by the Act of 1956. The distinction between institution of a proceeding on a police

report and that on a complaint is, therefore, material and important only if the Act of 1956 applies to the inquiry proceedings before the lower court and not otherwise and, therefore, the first and the main question to be considered is whether the Act of 1956 applies to the case or not. The second question namely whether the case has been instituted on a police report or complaint will arise and require consideration only if the Act of 1956 is held to apply to the case. The issues in regard to this matter, as raised in para 8 of the revision petition, are as follows :-

"(a) Is clause 2, Section 1 of Act XLII of 1956 ultra vires of the State Constitution of 1996, and therefore void and consequently is the said Act in force and operative in the State;

(b) Is the inquiry pending before the Magistrate governed by Section 207-A of the Amended Code of Criminal Procedure or by Section 208 of the said Code."

Mirza Moh'd Afzal Beg argued the case for himself and for other petitioners and the learned senior Prosecution Counsel and the Advocate General argued for the prosecution. In considering the constitutionality of Sub-section (2) of Section 1 of the Act of 1956 the learned lower Court has referred at considerable length to the question of delegated and limited legislation and I would like to observe at once that the question did not call for such a detailed discussion. The matter in controversy is a narrow one and it is given in clause (a) of para 8 of the revision set out above. The question raised in clause (b) is covered by the first question raised in Clause (a). The next question is whether the provision of Sub-section (2) of Section 1 of the Act of 1956 leaving the date of the commencement of the Act to be declared by the Government is unconstitutional apart from the provisions of the Constitution Act of 1996.

I would like to consider the second question first and observe at once that the provision of Sub-section (2) of Section 1 of the Act of 1956 is not unconstitutional and in support of this view I would refer to A. I. R. 1957 Supreme Court 510. The following view, as given in the headnote, was expressed by the Supreme Court :—

"When an appropriate legislature enacts a law and authorises and an outside authority to bring it into force in such area or at such time as it may decide that is conditional and not delegated legislation ; and such legislation is valide. It cannot be said that while it may be competent to the legislature to leave it to an outside authority to decide when an enactment might be brought into force, it is not competent to authorise that authority to extend the life of an Act beyond the period fixed therein. On principle, it is difficult to see why if the one is competent, other is not. The reason for upholding a legislative provision authorising an outside authority to bring an Act into force at such time as it may determine is that it must depend on the facts as they may exist at a given point of time whether the law should then be made to operate and that the decision of such issues is best left to the executive authority. Such legislation is termed conditional because the legislature has itself made the law in all its completeness as regards 'place, person, laws, powers', leaving nothing for an outside authority to legislate on, the only function assigned to it being to bring the law into operation at such time as it may decide."

Mr. Beg argued that giving of powers to the Government to determine the time when an Act shall come into force amounted to investing it with despotic powers as the Government may delay the enforcement of an Act passed by the legislature indefinitely and thus defeat the object of the Act itself and flout the legislature. He argued that such a provision in an Act violates the principles of natural justice. There is no force in this argument as the power in question is given to the Government by the legislature and it is not for a court to pronounce on the wisdom of the legislature.

I now take up the important question raised in clause (a)

of para 8 of the revision namely whether sub-section (2) of section 1 of Act No. XLII of 1956 is ultra vires of sub-section (3) of section 3 of the Constitution Act of 1996. For a proper appreciation of this question it is necessary to mention its background first. The Indian Code of Criminal Procedure was amended by the code of Criminal Procedure (Amendment) Act No. XXVI of 1955. The legislature of our State adopted almost entirely the above Amendment Act of India and passed the Code of Criminal Procedure (Amendment) Act No. XLII of 1956. It received the assent of the Sadar-i-Riyasat on 6th November 1956 and was published in an extraordinary issue of the Government Gazette dated 29th December 1956.

Sub-seetion (2) of section 1 of the Act provides :—

"It shall come into force on such date as the Government may, by notification in the Government Gazette, appoint."

The Government has not so far appointed the date on which the Act shall come into force.

Before proceeding further a few words may be said about the Indian Amendment Act. The Bill to amend the Code (Bill No. 69 of 1953) was publishd in an extraordinary issue of the Gazette of India dated 21st December 1953. There was no clause in this Bill in regard to the commencement of the Act and when it was referred to a joint committee of both Houses of Parliament the very first change proposed in the Bill by the Committee related to its commencement. They said in Para 7 of their report dated 3rd September 1954 :—

"There is no saving clause in the Bill. This may cause serious difficulties in the disposal of cases that would be pending before the courts at the commencement of the Act. The Committee, therefore, considers that it is dasirable that a suitable date from which the Act shall come into force be appointhd by the Central Government. This would give sufficient time to Government to make the requisite administrative arrangements. The necessary provision has accordingly been made in this clause."

This recommendation of the Joint Committee was accepted by Parliament and as a result thereof sub-section (2) was added to Section I which provides :—

"It shall come into force on such date or dates as the Central Government may appoint, and different dates may be appointed for different states and for different provisions of this Act."

Section 117, to which section 101 of the State Amendment Act of 1956 corresponds, was also added to provide for savings.

When Act No. XLII of 1956 was passed by the State Legislature and published in the Government Gazette, the Jammu and Kashmir Constitution Act 1996 (No. XIV of 1996) was in force. Section 31 of this Act deals with return of Bills, assent and Acts. Sub-section (3) of this section, which is relevant to this case, has undergone several changes. As originally enacted the sub-section provides :—

"The Bill which is assented to under the last preceding sub-section shall be published in the Gazette in English and shall then become an Act and have the force of law."

It was amended by the Amendment Act No. XVI of 2008 and after this amendment it stood as under :—

"A Bill which is assented to under the last preceding sub-section shall be published in the Gazette both in Urdu and English and shall then become an Act and have the force of Law."

It was again amended by the Amendment Act No. XLVII of 2011 and after this amendment the sub-section stood as under :—

"A Bill which is assented to under the last preceding sub-section shall be published in the Gazette in Urdu and English and shall become an Act and have the force of law as soon as it is published in either of the aforesaid languages."

The sub-section as it stood at the time of the passing of the

Code of Criminal Procedure (Amendment) Act of 1956 was as set out above after the Constitution Amendment Act of 2011.

The history of the changes that this sub-section has undergone would show that the changes only relate to the language in which the Bill after it was passed by the legislature was to be published in the Gazette. As originally enacted the sub-section required the Bill to be published in English but under the Amendment Act of 2008 it required it to be published both in Urdu and English. The Amendment Act of 2011 retained the provision of the Act of 2008 regarding the publication of the Bill both in Urdu and English but provided that the Bill "shall become an Act and have the force of law as soon as it is published in either of the aforesaid languages."

It may be observed that sub-section (3) of section 31 of the Constitution Act of 1996 is peculiar to that Act. There is no similar provision in any of the Government of India Acts that laid down the Constitution of India before the attainment of Independence or in any other enactment. Article III of the Constitution of India which deals with "assent to bills," also has no similar provision. This Article provides that "when a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill or that he withheld assent therefrom." There could be no provision in the Constitution is concerned with the various stages through which a legislative measure has to pass before reaching the final stage of becoming an Act and is not concerned with the commencement of an Act passed by the Legislature. And that is a matter provided for in section 3 (12) read with section 5 of the Indian General Clauses Act 1897 which is based on section 36 of the (British) Interpretation Act, 1889. These provisions will be referred to again at length presently. Section 78 of the present Constitution of the State is a verbatim copy of article 111 of the Indian Constitution and there is no provision in it similar to section 31 (3) of the Constitution Act of 1996. There being no provision similar to section 31 (3) of the Conatitution Act of 1996 in any other Constitution or enactment attempt has to

be made to interpret the same without any guidance from case law.

The contention on behalf of the petitioners is that by virtue of sub-section (3) of section 31 of the Constitution Act of 1996, the Act of 1956 must be deemed to have come into force on 29th December 1956 when after receipt of assent it was published in the Government Gazette in English; and the Constitution Act being the fundamental and paramount law, the provison of sub-section (2) of section 1 of the said Act leaving it to the Government to appoint the date on which it shall come into force is contrary to the aforesaid provision of the Constitution Act and, therefore, null and void and of no effect. The contention of the petitioners, in other words, is that notwithstanding sub-section (2) of section of the Act of 1956, the said Act came into force from the date of its publication in the Government Gazette.

I have considered the above arguments and have no hesitation in observing at once that Section 1 (2) of the Act of 1956 is not ultra vires of Section 31 (3) of the Constitution Act of 1996. I proceed to consider this question apart from the general presumption that the Legislature does not intend to exceed its jurisdiction. I am clearly of the opinion that sub-section (3) of Section 31 of the Constitution Act of 1996 merely provides that it is only on publication of the Bill in the Government Gazette that it "shall become an Act and have the force of law," and not that it shall come into force. To say that the Bill "shall have the force of law" is quite different form saying that it shall come into force. In other words, the above provision only means that the publication in the Government Gazette of a Bill passed by the legislature and assented to by the Sadar-i-Riyasat is necessary for its becoming an Act, this being taken to be the last stage in the legislative process. An "Act" means an instrument having the force of law, a decree passed by a legislative body. The words "shall have the force of law", therefore, merely give the accepted meaning of the word "Act" and describe the effect of the Bill becoming an Act and do not provide for the commencement thereof. There can

be no doubt that the date of the commencement of a particular Act must be looked for in the Act itself and if the Act leaves it to the Government to appoint such date, the Act cannot come into force untill such date is declared by the Government.

That the legislative authority that enacted the Constitution Act of 1996 intended to leave the date of the commencement of an Act enacted by the legislature to be provided for in the Act itself will be clear from a casual perusal of the innumberable Acts enacted after the commencement of the Constitution Act. If sub-section (3) were intended to mean what is contended by the petitioners then there would be no provision in any enactment passed after the Constitution Act in regard to the date of its commencement because by operation of subsection (3) of Section 31 it would automatically come into force on the date of its publication in the Gazette. It may be observed here that every Act passed after the Constitution Act of 1996 contains specific provisions in regard to its commencement. Some of the Acts, which are very few, provide that they shall come into force at once. In some Acts, which are also very few it is provided that they shall come into force when after receiving assent they are published in the Government Gazette. In some of the Acts, as in the corresponding Indian Code of Criminal Procedure (Amendment) Act No. XXVI of 1955, it is provided that "it shall come into force on such date or dates as the Government may, be notification in the Government Gazette, appoint and different dates may be appointed for different areas and different provisions of the Act." In a vast majority of Acts it is provided, like the Act XLII of 1996, that "it shall come into force on such date as the Government may, by notification in the Government Gazette, appoint." Such varying provisions in regard to the commencement of Acts are to be found in enactments passed after the Constitution Act of 1996 by the Legislative Assembly which functioned up to the invasion of the State in the Samvat year 2004 or by His Highness or Shree Yuvraj Bahadur in exercise of inherent powers reserved under section 5 of the Constitution Act or by the Constituent Assembly functioning as the Legislative Assembly. Mr. Beg contended

that the late Sir Gopalaswami Ayangar and Sir B. N. Rau placed the same meaning on the words "shall have the force of law" used in Section 31 (3) as placed by the petitioners and that their view was entitled to great consideration. It is not possible to beleive that they could ever hold such a view. The Constitution Act of 1996 was passed by His Highness when Sir Gopalaswami Ayangar was the Prime Minister of the State and the Act must have been drafted by him. If he had held the view attributed to him he would not have made varying provisions regarding commencement of an Act in all the Acts passed by the legislature during his office as Prime Minister. In the Acts passed by the legislature during the Prime ministership of Sir B. N. Rau also similar varying provisions in regard to their commencement are to be found. It would not be without interest to observe here that a large number of enactments drafted and initiated by Mirza Moh'd Afzal Beg petitioner, when he was a member of the Government of the time, contain varying provisions like those enumerated above in regard to their commencement.

The above facts will make it clear beyond any doubt that the words shall have the force of law "used in section 31 (3), were never intended to mean "shall come into force". It will be further clear that the interpretation uniformly placed all these years by all the lagislative authorities of the State on the provision of subsection (3) of Section 31 of the Constitution Act of 1996 is directly contrary to that ought to be placed on it by the petitioners and it cannot be disputed that this clear interpretation of the legislature itself is conclusive on the matter. It cannot be asserted that all these years the legislature was ignorent of the pravision of the above subsection. It is a fundamental rule of interpretation that ignorance cannot be attributed to the legislature. There is evidently no force in Mr. Beg's argument that the above uniform practice of the lagislature cannot be taken into consideration in interpreting subsection (3) of Section 31.

There is perhaps a reason why the peculiar words "shall become an Act and have the force of law" have been used in

this subsection. It is perhaps that even though the Legislative Assembly was established in the State under Regulation No. 1 of 1991, the laws passed by it were not called Acts but Regulations and, therefore, this sub-section provided that the laws passed by it would henceforward be called Acts. That this was perhaps the object of the subsection will be clear from the provision of subsection (4) of this Sect,on which provides that "in all the Regulations now in force in the State on the date on which this Act comes into force and in the rules, orders, proclamations and notifications, issued under such Regulations; the word "Act" shall, unless the context otherwise requires, be substituted for the word "Regulation.".

The historical aspect of the provisions of Subsection (3) of Section 31 of the Constitution Act of 1996, is not without interest, and a brief reference may be made to it with advantage. Before the passing of the Interpretation Act 1889 (52 and 53 Vict C 63) every Act passed by the British Parliament contained definitions not only of expression peculiar to the Act itself but those of even common words and every repealing and consolidating Act contained complicated savings so as to prevent any interference with vested rights or unintended retrospective action. Since that time savings have, by operation of the Interpretation Act, automatically attached to a repeal. The preamble of that Act shows that it was enacted "for consolidating enactments relating to the construction of Acts of Parliament and for further shortening the language used in the Acts of Parliament. The Indian Legislature also passed the General Clauses Act of 1897 (Act X of 1897) on the lines of the (British) Interpretation Act of 1889 and several important provisions relating to repeals and other matters will be found to be a verbatim copy thereof. The State General Clauses Act of 1977 Act XX of 1977 is similarly based on the Indian General Clauses Act.

Section 36 of the Interpretation Aet dealing with commencement of Acts provides :--

(1) "In this Act, and in every Act, passed either before or after the commencement of this Act, the expression "com-

mencement" when used with reference to an Act, shall mean the time at which the Act comes into operation."

(2) When an Act passed after the commencement of this Act, or any order in Council, order, warrant, scheme, letters patent, rules, regulations or bye-laws made, granted or issued under a power conferred by any such Act, is expressed to come into operation on a peculiar day, the same shall be construed as coming into operation immediately on the expiration of the previous day".

It may be observed here that under the Interpretation Act "commencement" means the time at which the statute comes into operation, which, when no other time is provided is the commencement of the day upon which it receives the Royal Assent.

Section 3 (12) read with section 5 of the Indian General Clauses Act correspond to section 36 of the Interpretation Act and provide :—

"3 (12) commencement with reference to an Act or Regulation shall mean the day on which an Act or Regulation comes into force."

5 (1) When any Central Act is not expressed to come into operation on a particular day then it shall come into operation on the day on which it receives the assent of the President.....

3. Unless the contrary is expressed a Central Act or Regulation shall be construed as coming into operation on the expiration of the day preceding its commencement."

Under these provisions if an Act does not specify the day on which it shall come into force then it shall come into operation on the day on which it receives President's assent. The day of the commencement of an Act has, therefore, to be looked for in the Act itself. When Indian laws were applied to our State under the Jammu and Kashmir Consolidation of Laws Regulation (No. IV of 1977) in the General Clauses Act of India as applied to the State, section 5 was omitted and

instead thereof section 12 of the Consolidation Regulation was enacted which provided :—

"All Regulations, Ailans, Notifications or enactments intended to have the force of law in the State or any part thereof, shall after receiving the assent of the His Highness be published in three consecutive numbers of the State Gazette and shall have the force of law after such publication.

Provided that His Highness may direct with regard to any particular law that it shall come into force immediately on receipt of his assent or from such date as His Highness may in this behalf specify."

This section, if read even without the proviso, lays down in substance the same rule as is laid down in section 5 of the General Clauses Act except that publication of Regulation in the Gazette after receipt of assent is necessary. The Regulations would under this section come into force automatically on their publication in the Gazette ouly if there was no provision in them in regard to their commencement.

The above meaning of the section itself was made further clear by the proviso added to it. I am of the opinion that the section would have the same meaning even without the proviso. I am further of the opinion that the provisions of section 12 of the Consolidation Regulation 1977 and Section 31 (3) of the Constitution Act of 1996 are in substance the same and that the latter did not effect any change.

Most of the provisions of the Consolidation Regulation of 1977 were repealed by the Amending and Repeating Act, No. XI of 1996 ; and section 12 set out above, which had not been repealed by the above Act was repealed by the Constitution Act No. XIV of 1996. Section 12 was repealed perhaps because seciton 31 (3) of the Constitution Act had made a similar provision. When the Constitution Act of 1996 was repealed by the present Constitution which, but for a few sections specified in subsection (2) of Section 1, come into force on 26th January 1957, there was in it no provision similar to subsection 31 (3) of the Constitution Act of 1996 or section 12

of the Consolidation Regulation of 1977 ; but as soon as this was noticed by the legislature it passed the General Clauses (Amendment) Act No. XIX of 1957. It was published in an Extraordinary issue of the Government Gazette dated 30th September 1957. Subsection (2) of Section 1 provides that "It shall come into force with effect from 26th day of January 1957."

Section 5 which was originally omitted when applying the Indian General Clauses Act to our State in 1977 Bikrami, was inserted and it provides :—

"Where any act is expressed to come into operation on a particular day it shall come into operation the day on which the assent thereto of the Sadar-i-Riyasat is published in the Government Gazette."

The rules laid down in the General Clauses Act have to be applied for the interpretation of all legislative enactments includidg the Constitution. Though this is so, the State Constituent Assembly left no room for doubt in regard to this matter and provided in Section 158 of the Constitution that "Unless the context otherwise requires, the General Clauses Act, S. 1977 shall apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the State Legislature".

With utmost respect for the respective legislative authorities that enacted Section 12 of the Consolidation Regulation of 1977 and section 31 (3) of the Constitution Act of 1996 and its subsequent amendments, I would observe that it was not wise to omit section 5 from the General Clauses Act of 1977 as applied to the State and enact section 12 in the Consolidation Regulation instead or to enact subsection (3) of Section 31 of the Constitution Act and repeal Section 12 of the Consolidation Regulation. The only proper course was to retain Section 5 of the Indian General Clauses Act in the Act as applied to the State in the year 1977 and not to have scction 12 of the Consolidation Regulation or Section 31 (3) of the Constitution Act of 1996. This has been done now under the General Clauses

(Amendment) Act of 1957 referred to herein before but after a lapse of nearly four decades.

It will be clear from the foregoing discussions that the expression "passing of an Act" refers to the date at which the assent is given and not to the commencement of its operation. Under Section 3 (9) of the General Clauses Act, corresponding to section 3 (12) of the Indian Act "commencement used with reference to an Act or Regulation shall mean the day on which the Act or Regulation comes into force." It will be clear that the commencement of an Act may vary as regards different areas and as regards its various provisions. It is left to the legislature to specify in the Act the particular day on which it shall come into force. It is only if the legislature does not provide for it in the Act that the Act comes into operation on the day on which the assent thereto of the Sadar-i-Riyasat is published in the Government Gazette. It will be further clear that the meaning of Subsection (3) of Section 31 of the Constitution Act of 1996 is the same as contained in the provision of Section 12 of the Consolidation Regulation of 1977 which was replaced by it or in section 5 of the General Clauses Act as now added under Act No. XIX of 1957.It is clear beyond doubt that it was within the competence of the legislature to make provision as regards the day on which the Act of 1956 shall come into force and that, therefore, subsection (2) of Section 1 thereof is not ultra vires of the Constitution Act of 1996 and is perfectly valid. The result is that the Act of 1956 has not yet come into force and the conclusion of the Special Magistrate is correct and does not call for any interference. Because of the above view the question whether the case against the petitioner was instituted on a police report or on a complaint does not arise and does not require consideration.

Mr, Beg referred to a few matters of administrative nature, in support of his contention that the Government and other State authorities have been treating the Act of 1956 as being in force until a few days before 28-11-1958 when the question was raised specifically and directly by the petitioner. I think it unnecessary to discuss these matters beyond observing that

these matters are explainable and are not inconsistent with the position taken by the prosecution in this case. Likewise I think it unnecessary to discuss the grievance of the petitioners that the Special Magistrate has not enforced compliance of his order dated 11th June 1958 relating to production of documents pertaining to the case. The result is that there is no force in this revision which must be dismissed.

The revision is dismissed and the order of the lower Court upheld. Announced.

Jammu;
Dated 28-2-1959, Sd. Sessions Judge, Jammu.

High Court of Judicature, Jammu & Kashmir.

Present:

The Hon'ble Janki Nath Wazir, Chief Justice

&

The Hon'ble K. V. Gopalakrishnan Nair, Judge.

Writ Petition for habeas corpus No. 9 of 1959.

SUFI MOH'D AKBAR & OTHERS

versus

1. THE STATE OF JAMMU & KASHMIR,

2. MR. N. K. HAK, SPECIAL MAGISTRATE, JAMMU.

Mr. M. A. Latif with the petitioners.

Messrs G. S. Pathak, N. Prasad, Jaswant Singh, R. K. Kaul, Inder Das and S. Prakash.

Gopalakrishnan Nair J :

This is a petition asking for writs of Habeas Corpus, prohibition and certiorari.

The petitioners who are eight in number are some of the persons against whom a preliminary inquiry under Chapter XVIII of the Code of Criminal Procedure, 1989, is being held

by the second respondent, in respect of offences punishable under Sections 121-A and 120-B of the Ranbir P. C. read with rule 32 of the Jammu and Kashmir Security Rules and the said rule 32. Some of the accused persons raised a contention before the Committing Magistrate that the Criminal Procedure Code (Amendment) Act, 1956, (Act No. XLII of 1956) was in force in the State and that the inquiry should, therefore, be held in accordance with its provisions. The Committing Magistrate by his order dated 7-2-1959 overruled the contention holding that Act XLII of 1956 has not come into force. The petitioners allege that they are aggrieved by that order. They say that by virtue of sub section (3) of Section 31 of the Jammu and Kashmir Constitution Act 1996, Act XLII of 1956 came into force on the date it was published in the Gazette after having received the assent of the Sadar-i-Riyasat. The proceedings taken by the Committing Magistrate on the basis that Act XLII of 1956 is not in force are, therefore, without jurisdiction and liable to be quashed on certiorari. A writ of prohibition is also asked for to restrain the Magistrate from proceeding with the inquiry. The petitioners also claim a writ of Habeas Corpus because they are being proceeded against and detained otherwise than in accordance with the procedure established by law.

The State of Jammu & Kashmir which is the first respondent opposes the petition on the ground that is wholly devoid of merit. The order of the second respondent holding that Act XLII of 1956 is not in force is absolutely correct. It is pointed out that sub-section (2) of S. I of Act XLII of 1956 expressly provides that the Act shall come into force only on such date as the Government may by Notification in the Government Gazette appoint. No such Notification having been issued by the Government, it is totally wrong to contend that Act XLII of 1956 has come into force. It is also urged that sub-section (3) of S. 31 of the Jammu & Kashmir Constitution Act, 1996, has no bearing on the question and that does not at all deal with the subject of bringing an Act into operation.

It is common ground that Act XLII of 1956 received the

assent of the Sadar-i-Riyasat on 6th November 1956 and was published in the Government Gazette on 29th December 1956. Sub-section. (2) of S. 1 of that Act reads :—

"It shall come into force on such date as the Government may, by Notification in the Government Gazette appoint."

It is admitted that the Government has not yet issued any Notification appointing the date for the coming into force of the Act. This circumstance alone would ordinarily be sufficient for holding that Act XLII of 1956 has not come into force. But the petitioners have strenuously contended that sub-section. (2) of S. 1 of Act XLII of 1956 is void as it is clearly opposed to the mandatory provisions contained in sub-section. (3) of S. 31 of the Jammu & Kashmir Constitution Act, 1996. It is, therefore, necessary to examine the provisions of S. 31 (3), of the Constitution Act. That provision as it stood at the time of the passing of Act XLIII of 1956 reads as under :—

"A Bill which is assented to under the last preceding sub-section shall be published in the Gazette in Urdu and English and shall become an Act and have the force of law as soon as it is published in either of the aforesaid languages."

The case of the petitioners is based entirely on the interpretation of this provision. The first part of their argument is that the words "shall have the force of law" in S. 31 (3) mean nothing more and nothing less than "shall come into force." The second part of the argument runs. S. 31 (3) of the Constitution Act has enacted in mandatory terms that a Bill assented to by the Sadar-i-Riyasat and published in the Gazette shall come into force on such publication. The Constitution Act is the paramount law. Any legislation undertaken after the coming into force of the Constitution Act has necessarily to comply with its provisions. If any provision of a subsequent enactment is in any manner repugnant to any provision of the Constitution Act, the former will be void. Sub-section. (2) of S. 1 of Act XLII of 1956 which postpones the coming into force of that Act to a date to be notified by the

Government violates the imperative provisions of S. 31 (3) of the Constitution Act. S. 1 (2) of Act XLII of 1956 is, therefore, void and consequently Act XLII of 1956 has to be held to have come into force as soon as it was published in the Government Gazette after being assented to by the Sadar-i-Riyasat. We have to examine the validity of these arguments.

The argument that the expression "shall have the force of law" is synonymous with the expression "shall come into force" appears to us to be very difficult to accept. The expression "shall come into force" is a very familiar one. It is to be found in every Statute which contains a "commencement section." The number of such Statutes is legion. In every one of those statutes the expression "shall come into force" has been invariably employed to indicate the coming into effective operation of the law. The expression was uniformly used for the same purpose and in the same sense in many statutes of this State passed before the year 1996. Thus the expression "shall come into force" was well understood and well established at the time of the passing of the Constitution Act, 1996. Indeed, the Constitution Act itself has employed that expression in S. 2 which reads :—

> "This Act shall extend to the whole of the Jammu and Kashmir State and shall come into force at once."

We find the expression used in Sub-section (4) of S. 31 itself which is as under :—

> "In all the Regulations in force in the State on the date on which this Act comes into force and in the rules, orders, proclamations and notifications issued under such Regulations, the word "Act" shall, unless the context otherwise requires, be substituted for the word "Regulation."

The question is why should an entirely different expression have been employed in sub-section (3) of S. 31, if the intention was to convey the same meaning. We are unable to find a reasonable answer to this. We are of the view that the expression "shall come into force" was intended to convey a

meaning different from that conveyed by the words "shall have the force of law." It will be wrong to assume that the legislature employed expressions of such widely differing import to express one and the same intention. The correct rule of interpretation is that a change of language suggests a change of intention. We have to give the words "shall have the force of law" their natural and ordinary meaning. It is not permissible to construe the words of a statute by giving them an unnatural and artificial meaning. We have to gather the intention of the legislature primarily from the words employed in the statute. It is wrong and hazardous to hunt after the *supposed* intention and to strain the express words of the statute in an effort to make them somehow subserve the supposed intention. Giving the words "shall have the force of law" occurring in S. 31 (3) of the Constitution Act their plain and natural meaning, we are of the opinion that they only denote that the Bill shall acquire the status or quality of law, in other words become law. It is only after a Bill has become law that it can be brought into force. To put it in other words, only a piece of legislation which has acquired the force of law can be brought into force as law. S. 31 (3) of the Constitution Act speaks of a Bill becoming law, that is to say acquiring the force of law. It does not deal with the question of bringing that law into force. The two things are different. In 82 Corpus Juris Secundum, in S. 399 dealing with the time of the taking effect of Statutes, it is stated as follows :—

> "When a bill has been passed by the legislature and signed by the Governor, it becomes a law in the sense that it may not be changed or modified by the courts, and a statute may become a law on the passage, even though by its own provisions its effective date is postponed. In this connection it has been said that "passage" of an act is understood to refer to the time when it is stamped with the requisite approval by the legislature and the chief executive, but that the going into effect of a bill refers to its becoming actually operative as existing law. It has been said that a statute may have a potential existence, although it will not go into operation until a future time and that until the time arrives when it is to take effect and be in force, a statute which has been passed by both Houses of the legislature and approved by the executive has no force whatever for any purpose. Before that time no rights may be acquired under it and no one is bound to regulate his conduct according to its terms and all acts purporting to have been done under it prior to that time are void."

This is sufficient authority for the proposition that an enactment which has become a valid law may not yet come into force until the day appointed by the legislature for that purpose. It, therefore, appears to us to be idle to contend that the two statements, namely, (1) that a Bill shall become an Act and have the force of law, and (2) that the Act shall come into force, have one and the same meaning.

We may notice at this stage an argument advanced on the side of the petitioners that it was unnecessary for the legislature to have said that the Bill shall become an Act and also that the Bill shall have the force of law, if the intention was to convey the same meaning by each of these expressions. We do not consider this argument can in any manner affect the ordinary grammatical meaning of the words of Section 31 (3) or in any way after the clear intention expressed in that provision. May be, the legislature wanted to emphasize the fact that the legislation shall be regarded as a law. It also appears to us that the legislature wanted to indicate clearly that a Bill duly passed by the Legislative Assembly, assented to by the Head of the State and published in the Gazette shall be known as an Act. This was perhaps considered necessary because the laws of the State were previously known as Regulations. They wanted to provide expressly that from the date of the coming into force of the Constitution Act the laws passed by the legislature will be known as Acts and not as Regulations as theretofore. A reference to sub-section (4) of Section 31 supports this view. Be that as it may, the fact remains that we are unable to agree

that Section 31 (3) makes provision for the coming into force of an Act.

The petitioners appear to have realized that the mere contention that the words "shall have the force of law" mean the same thing as "shall come into force." it not sufficient to ensure their success, for the position then will be that subsection (2) of S. 1 of Act XLII of 1956 will also have validly come into force and that being the only provision relating to the date of the commencement of the Act may have to be given effect so far as that matter is concerned. The effort of the petitioners has, therefore, been to put subsection (2) of S. 1 of Act XLII of 1956 completely out of their way. They therefore urge that the Section is void, being repugnant to S. 31 (3) of the Constitution Act. According to them, S. 31 (3) imposes a prohibition on the legislature to appoint a date of its own choice for the coming into force of an Act. It matters not whether such date is specified by the legislature itself in the Act or whether it is left by the legislature to be fixed by an outside authority to whom it entrusts the matter. S. 31 (3) of the Constitution Act which is the paramount law on the subject has unalterably fixed the time when an Act is to come into force. A legislature which is bound to function within the limits of the Constitution cannot, therefore, enact a different time or date for the coming into force of an Act. This line of argument seems to us to be not really available to the petitioners in view of what we have already stated regarding the true meaning of the words "shall have the force of law" occurring in S. 31 (3) of the Constitution Act. But as the argument has been pressed upon us by the petitioners with great vigour and insistence, we propose to deal with it at some length.

The argument is based entirely on the preseumption that S. 31 (3) of the Constitution Act contains a legislative prohibition of the kind mentioned above. We are, however, unable to find any such prohibition in the express words of S. 31 (3); nor do we find it reasonably possible to read such a prohibition by implication into the provisions of

S. 31(3), without doing utmost violence to the language of that section and without flagrantly violating the well-established canons of interpretation. Not only this, we shall have in order to accede to the argument advanced, practically to enact a new section 31(3) in the guise of interpreting that section. This we cannot do. We have already stated that the words "shall have the force of law" cannot be understood as meaning "shall come into force". We have only to add that the form in which S. 31 (3) is cast is not appropriate for enacting a legislative prohibition. Nor is the setting of S. 31 (3) the appropriate place where one can reasonably expect such a constitutional restriction on legislative power to be inserted. S. 31 mainly deals with what may be described as legislative procedure. The powers of the legislature are dealt with in S. 23 of the Constitution Act. A provision enacting a limitation on legislative power will be inserted at the place where the powers of the legislature are dealt with. Such a provision would not have been relegated to a section dealing with legislative procedure. Furthermore, a legislative prohibition will be couched in clear and unambiguous terms and often the language of prohibition would be employed. Neither the words used in S. 31 (3) nor the form in which it is couched nor the place where it occurs seems to accord with the contention of the petitioners that it embodies the legislative prohibition already referred to. If a restriction on the legislative powers was really intended, it would not have been expressed in such an indirect and covert manner and in such inappropriate and ill-chosen words. We are also of the view that there was no good reason for the framers of the Constitution Act to prohibit the natural and ordinary right of the legislature to enact as to when an Act shall be brought into force. Such power was exercised by every legislature in India including the legislature of the State of Jammu & Krshmir, before the Constitution Act of 1996 was passed. That has been the legislative practice obtaining in other countries also. For instance, Craies in his Statute law (5th Edi.) at page 354 says:—

"It is common practice to specify in Acts of Parliament

the day on which the Act is to come into operation. There is often an "appointed day" clause in an Act, as for instance in the Local Government Act, 1888, S. 109".....the appointed day for the purpose of this Act shall.....be the firstof April next.....or such other day earlier or later as the Local Government Board may appoint." (As to the advantage of such a clause, see Carr, Delegated Legislation, P. 10-12.)

In the Queen *vs.* Burah, I.L.R 4 Call. 172 at page 182, Lord Selborne observed thus :—

> "Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordship's judgement) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion entrusted by the legislature to persons in whom it places confidence, is no uncommon thing ; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of legislative powers which it from time to time conferred."

It will thus be seen that not only in India but also in England the legislature has been exercising for long years the power of enacting as to the time when its laws shall come into force. Almost every legislature in India has also been passing what is known as conditional legislation. This legislative practice has been adopted for long years in this State. There appears to have been no reason for the framers of the Constitution Act of 1996 to depart from this long established and convenient legislative practice. And if a departure was really intendedi a clear provision to that effect would have been prominently inserted in the Act in view of long practice which had obtained previously.

It is of some importance to note that even after the coming into force of the Constitution Act of 1996 many an enactment passed by the State legislature has embodied as commencement clause specifying a date for the coming into force of the Act. In a number of cases the State legislature had even after 1996 entrusted it to the Governmeet to appoint a date for the coming into force of the Acts passed by them. This clearly shows that the State legislature always understood that they had the power to appoint a date for the coming into force of the Acts passed by them. This consistent conduct on the part of the legislature strongly militates against the contention of the petitioners that S. 31 (3) of the Constitution Act of 1996 prohibited the legislature from appointing a date of their own choice for the coming into force of the laws passed by them. We may also mention in this context that it is legitimate to presume that a legislature well understands its powers and functions. On the other hand, it is not correct to presume that the legislature has been ignorant of its powers and limitations and that for many years it passed legislation after legislation without having the necessary power to do so. There is presumption in favour of the constitutionality of a statute and the burden is on the person who challenges it as unconstitutional to establish his case. We have also to bear in mind that where two interpretations are equally possible, the one which is in favour of the validity of an Act must be preferred.

Considering every aspect of the matter, we find ourselves wholly unable to accede to the contention of the petitioners that S. 31(3) of the Constitution Act prohibits the State legislature from appointing a date for the coming into force of an Act or from leaving it to the Government to appoint such a day by Notification in the Government Gazette. It follows that subsection (2) of S. 1 of Act XL11 of 1956 is not void as being repugnant to any provision of the Constitution Act of 1996.

The petitioners have not contended that S. 1 (2) of Act XLII of 1956 is an unconstitutional delegation of legislative power. We say, however, clearly state here that it is only a case of conditional legislation which is valid in law. We need

in this connection refer only to the decision of the Supreme Court in Inder Singh vs. the State of Rajasthan, A. I. R. 1957 S. C. 510.

It follows from the foregoing that the order of the Committing Magistrate dated 7-2-1959 which is challenged by the petitioners is correct. The writ petition which is based on the alleged incorrectness of the aforesaid order of the Committing Magistrate is, therefore, devoid of merit. The petitioners are lawfully detained and dealt with according to the procedure established by law. We do not find any excess of jurisdiction in this case to justify the issue of a writ of prohibition to restrain the committing Magistrate from proceeding with the preliminary inquiry; nor do we see any ground for granting a writ of certiorari in favonr of the petitioners. As we already indicated, there is no ground for saying that the petitioners are held in custody without legal justification or otherwise than in accordance with the procedure establishad by law. A writ of Habeas Corpus cannot, therefore, issue.

In the result the petition is dismissed.

SD. K. V. GOPALAKRISHNAN NAIR.

I agree

JAMMU, SD. JANKI NATH WAZIR.

8th April 1959.

CHAPTER VI.

In the Court of Special Magistrate, Jammu.

STATE vs MIRZA MOHD. AFZAL BAG AND OTHERS.

[Presenetd by Mirza Afzal Beg. File. Sd. N. K. Hak, Special Magistrate.]

Application challenging the jurisdiction of the court to proceed against Pakistan officials.

The applicants beg to submit as under:-

1. That I of the accused persons in the complaint have been described as Pakistan National residing in Pakistan outside the territories of Jammu & Kashmir & of India.

2. That it is only in cases where the accused person who is an alien has been apprehended in the territories of India & produced before the court that the doctrine of hexhoci can be made applicable in order to confer jurisdiction to proceed against him.

3. That, however, it appears that even before the inception of the complaint, the said Pakistani officials were never apprehended and produced before the court.

4. It is, therefore, submitted that the doctrine of hexhoci cannot apply to them and hence no order to the effect that the side officials are absconding or concealing themselves can be recorded by this Hon'ble Court.

5. It is submitted that no warrant of arrest or any other process could or can ever be issued against the said Pakistan officials.

6. That the object of joint trial under the alleged charges of conspiracy is to make the evidence against any one of the accused to be read as evidence against the other accused persons.

7. That however since this court has no jurisdiction to proceed against the Pakistan Nationals undersection 87 or

Section 512 Cr. P. C no evidence could be recorded against them and no such evidence can be read against the other accused.

8. It is submitted that even hearing any matter in reference to the the said Pakistan officials in the 'opening address' of the Prosecution would be without jurisdiction and the entire proceedings will be vitiated.

PRAYER.

It is therefore prayed that:–

1. The prosecution be ordered to enter nalleprosecui against the said Pakistan officials.

OR

2. To dismiss the complaint against the said 5 Pakistan officials.

3. To disallow the prosecution to refer to any matter concerning the said Pakistan officials in their 'opening address'.

4. To disallow the prosecution to refer any oral or documentary evidence in connection with any matter concerning the said Pakistan officials.

Sd. 1. M. A. Beg.
2. Mohi-ud-Din.
3. Ghulam Mohd. Chicken.
4. Pir Abdul Ghani.
5. Sofi Mohd. Akbar.
6. Mir Mohd. Nazir.
7. Ali Shah.
8. G. K. Beg.
9. Mohi-ud-Din Shah.
10. Vilgami.
11. Pir Mohd. Afzal.
12. Pir Mohd. Maqbool.

Special Magistrate.

Dated 13-3-1959.

In the Court of Mr. N. K. Hak, M. A., LL. B.
Special Magistrate, Magistrate 1st. Class Jammu & Kashmir,
J a m m u.

STATE *vs.* MIRZA MOHD. AFZAL BEG AND OTHERS.

Under Section 121 A. R. P. C. etc.

Application of Mirza Mohd. Afzal Beg & others dated 13-3-1959 challenging the jurisdiction of the Court to proceed against Pakistani National.

Present :–

Counsel for the Prosecution.
M/s Mani and Latif Advocates, and
Accused, exepting M/s Amin and Hamdani, in person.

ORDER.

This is an application filed by Mirza Afzal Beg and 11 other accused persons. The petitioners have challenged the jurisdiction of the Court to proceed against 5 accused persons who happen to be Pakistani Nationals. Their contention is that these accused persons being aliens this Court has no jurisdiction to proceed against them under section 87 or 512 of Cr. P. C. and that no such evidence can be read against the other accused. It has been prayed that prosecution be ordered to withdraw from prosecution so far as those accused persons are concerned or the complaint be dismissed against them. It has also been prayed that prosecution be disallowed to refer to any oral or documentary evidence in connection with any matter concerning those accused persons. There is also a prayer that prosecution may be disallowed to refer to any matter concerning these accused in their opening address.

So far as the matter relating reference in the opening address is concerned that has already been made.

This application has been opposed on behalf of prosecution.

Mr. Mani who represents Ali Shah accused and Mr.

Beg, have argued this application on behalf of accused.

Mr. Nageshwar Prashad argued on behalf of prosecution.

The contention on behalf of the accused is that evidence of absconsion with respect to these accused could not be taken by this court nor could process for their arrest be issued. Territorial jurisdiction of this Court as per Notification of the 'appointment' only through the State of Jammu and Kashmir and therefore these accused being outside of the jurisdiction of this Court could not be proceeded with by this Court.

Mr. Beg has argued that it was not only an academic question but a matter of vital importance for them. He has tried to make out that there was nothing to show that these accused have obsconded. He has referred to cases A.I.R. 1927 Allah (80), 1919 Lah. (459) and 1939 Sind (46). He has further argued that this Government has only colourable jurisdiction even over Pakistan occupied territory and that no evidence about these accused should be read against them and that the Court should order that their case be separated from the other accused.

Mr. Nageshwar Prashad has argued that law does not say that who have committed offence cannot be tried in the court where they have committed that offence and that the jurisdiction of this Court is not ousted. There was no law which disallowed adducing of evidence against foreigners. At present we are only concerned with taking evidence and question of trial or conviction does not arise at this stage. Evidence cannot be shut out. The cases cited on behalf of accused were not relevant. In this case one has to look the complaint and allegations stated therein. This is a case of conspiracy as detailed in the complaint and conspiracy is a continued offence. He has also argued that in view of the allegation in the complaint and the activities of the accused as stated therein there can under law be no bar to proceed in this case against these accused who happen to be Pakistani Nationals. He has cited the case of Empéror vs Chhota Lal Babar reported as I. L. R. 36 Bombay (524). So far as the question of evidence under

section 10 of the Evidence Act in a case like this is concerned he has also referred to A. I. R. 1957 S. C. (747) at a page 765.

The alleged conspiracy and the part played by the accused in the furtherance of that have been given in detail in the complaint.

In para 4 of the complaint we find the following :—

".....To achieve this object, the accused, between the 9th of August '53 and the 29th of April, 1958, amongst themselves and with other persons, known, and unknown at Srinagar and diverse other places, both in and outside the State, conspired to overawe by means of criminal force, and show of criminal force, the Government of the State."

In para 9 it is stated :—

".....further more, contact, direct and indirect, was maintained by the accused with Pakistan Agencies and intelligence officers, meetings were held with Pakistani officers at Srinagar and other places in the State and outside.....".

Mr. Nageshwar Prashad has argued that proceedings under Section 512 Cr. P. C. against these accused gave powers to the police the moment these accused persons set their foot in the State territory; they can be arrested and produced before the court, and in the face of allegations of their activities in the State and outside the State together with the nature of the case they can be proceeded with by this court and there was nothing illegal in proceeding against them in this case.

In case Emperor *vs* Chhota Lal Babar the accused happened to be subject of Cambay State. He lived there and traded with his business partner, A. He conspired with A at Cambay and sent A to a professional forger at Umreth (a place in British India) with instructions to instigate the latter to forge a valuable security. To facilitate the forgery, the accused sent his khata book with A. In pursuance of A's instigation the forgery was committed at Umereth. On these facts, the accused was charged in a court in British India, with the effence of abetment of forgery under section 467 and 109 of

I.P.C. The trying judge referred to the High Court the question whether the accused, not being A British subject, was amenable to the jurisdiction of his court.

The court held that the court in British India had jurisdiction to try the accused, for the accused's offence was not wholly completed within Cambay limits, but having been initiated there, was continued and completed within the British territory of Umreth.

That case appears to be analogous to this case. The allegations in the complaint and the alleged activities of the accused persons set out in the petition of complaint together with the sphere and scope of their activities specified therein and the nature of the case as alleged are factors which are going to determine jurisdiction of the court against the persons specified in the schedule of accused. A distinction has to be made in case of an offence completed in a territory outside the jurisdiction of the court in an alien territory and the one in which it is alleged to be continued and carried even within the jurisdiction of the court in question. If the alleged offence which is alleged against these Pakistani Nationals were such as could be said to have completed in the alien territory outside the jurisdiction of the court, then some thing could surely be said with regard to the objection raised on behalf of the accused in this petition. But as already stated above that is not said to be the case here. In the face of this Ruling it cannot be said that this court has no jurisdiction to try these accused simply because they happen to be Pakistan Nationals.

A. I. R. 1927 Allah (80) the case cited on behalf of the accused is not relevent in this case. That referred to a case of 411 I. P. C. in which subject of a native State who was guilty of retaining stolen property within the Native State was held not liable to be punished under the Indian Penal Code. There was no suggestion that the accused received the stolen animals anywhere within British India. On the contrary, the evidence in that case proved that the bullocks were brought by other accused to his house in the Native State.

A. I. R. 1919 Lah. (459) cited by the defence is also not relevant to this case. That was a case where subject of a Native State was charged with abetting an offence committed in British India and the alleged abetment consisted entirely of what the accused did or said within the State territory. It was held that he could not be tried in the court of British India for such abetment.

A. I. R. 1938 Sind (46) cited by defence has also no application to this case. In that case a person was arrested under the orders of A. D. M. Karachi who had purported to act under the provisions of Section 86 Cr. P. C. on the strength of a warrant issued by 1st class Magistrate Nasirabad and sent by him for being executed. Nasirabad was outside the limits of British India.

In this case no warrants have been sent for execution to any Magistrate outside the jurisdiction of this court. The warrants have been issued on the complaint detailing the part played by these accused persons in furtherance of the alleged conspiracy in furtherance of which they are alleged to have engaged themselves in alleged activities both inside and outside the State. This Sind case cannot, therefore, be said to have any bearing on this case.

In fact, every case has got to be dealt with in accordance with the facts and the circumstances contained in it. In this particular case if even in the face of the allegations against these accused persons and the case alleged by the prosecution, these accused persons are not proceeded with simply because they happen to be Pakistani Nationals then, that will amount to a position which is not warranted by law.

It may be stated here that a distinction has to be made in cases based on any other offence other than conspiracy and the case in which conspiracy and acts in furtherance of that conspiracy as detailed by the prosecution in this case are alleged.

In sections 2 and 3 of R. P. C. we find the words "Every person" and 'any person' respectively and those read with the

effect an allegation set forth in the complaint with respect to the part alleged to have been played by these accused in furtherance of the common intention i. e. the alleged conspiracy and the places where they are alleged to have acted as such clearly show that the court has not acted without jurisdiction in proceeding against these accused persons and the proceeding taken against them are legal. It may be mentioned here that there is no extradition treaty at present between India and Pakistan and in the absence of any such treaty are any reciprocal arrangement between the two countries to that effect no extradition proceedings could also be taken against these accused persons.

Section 10 of Evidence Act reads as follows :—

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, any thing said, done or written by any one of such person in referrence to their common intention, after the time when such intention was first entertained by any of them is a relevant effect as against each of the persons believed to be so consipiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was party to it."

In case Badri Rai and another *vs* State of Bihar reported as A. I. R. 1958 S. C. (1953) the statement made by one of the conspirator with respect to the part played by another in furtherance of that conspiracy was held to be admissible in evidence.

It has been held therein :—

".....the statement made by A that he had been sent by B to make the offer of the bribe in order to hush up the case which was then under investigation, was admissible not only against the maker of the statement – A—but also against B, whose agent the former was, in pursuance of the object of the conspiracy. That statement was admissible not only to prove that B had constituted A his agent in the perpetration of the crime, as also to prove the existence of the conspiracy itself. This

incident in the police station was evidence that the intention to commit the crime had been entertained by both of them on or before that day. Anything said or done or written by any one of the two conspirators on and after that date until the object of the conspiracy had been accomplished, was evidence against both of them. It was no answer in law to say that unles the charge under section 120-B had been framed, the Act or statement of one could not be admissible against the other. Section 10, Evidence Act, has been deliberately enacted in order to make such acts and statement of a co-con spirator admissible against the whole body of conspirators, because of the nature of the crime. (Object of section 10 indicated)."

At page 955 in para (1) of the same we find the observations :—

".....that statement is admissible not only to prove that the second appellant had constituted the first appellant is agent in the perpetration of the crime, as also to porve the existence of the conspiracy itself.....Section 10 of the Evidence Act, has been deliberately enacted in order to make such acts and statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of the crime. A conspiracy is hatched in secrecy, and executed in darkness naturally, therefore, it is not feasible for the prosecution to connect each isolated act or statement of one accused with the acts or statement of the other, unless there is a common bond linking all of them together. Ordinarily, specially in a criminal case, one person cannot be made responsible for the act or statements of another. It is only when there is evidence of a concerted action in furtherance of a common intention to commit a crime, that the law has introduced this rule of common responsibility, on the principle that every one concerned in a conspiracy is acting as the agent of the rest of them. As soon as the court has reasonable grounds to believe that there is identity of interest or community of purpose between a number of persons, any act done, or any statement are declaration made, by any one of the co-conspirators, is,

naturally, held to be the act or statement of the other conspirator, if the act or the declaration has any relation to the object of the conspiracy. Otherwise stray acts done in darkness in prosecution of an object hatched in secrecy, may not become intelligible without reference to the common purpose running through the chain of acts or illegal omissions attributable to individual members of the conspiracy."

"While discussing the aspects of the admissibility of evidence under section 10 of Evidence Act in case Sardul Singh *vs.* State reported as A. I. R. 1957 S. C. 747 at page 765 his lordship has been pleased to refer to certain cases on the point and has been pleased to observe that "it is recognized on well established authority that the principle underlying the conception of evidence under section 10 of the Evidence Act of the statements acts and writings of one co-conspirator as against the other is on the theory of agency."

In a case of crimial conspiracy an overt act committed by any one of the conspirators is sufficient, on the journal principle of agency, to make it the act of all.

Section 10 of the Evidence Act has been incorporated for cases of criminal conspiracy and for such a case a departure has been made in view of the peculiar nature of the cases involving criminal conspiracy. The question of relevancy or admissibility of a certain evidence has not yet arisen in this case, but if and when the evidence is produced the relevancy or admissibility in a ease of this nature i. e. alleged conspiracy shall have to be governed by the provisions of section 10 of Evidedce Act.

For the reasons stated above the prayer made by the accused in this petition cannot be granted and this application is, therefore, rejected.

Announced.
23-3-1959

Sd. N. K. HAK,
Special Magistrate,
J & K, Jammu.

Copy of revision petition attached with file No. 7 instituted on 13-5-59. Decided on 19-6-59. In the Court of Sessions Judge Jammu.

MIRZA MOHAMMAD AFZAL BEG & OTHERS *vs* THE STATE

In the Court of Sessions Judge, Jammu.

1. Mirza Mohammad Afzal Beg s/o Mirza Nizam Beg, Anantnag.
2. Kh. Ghulam Mohammad Chikan s/o Kh. Abdul Aziz Bhat, Karan Nagar Srinagar.
3. Mohi-ud-Din s/o Kh. Abdullah Joo Zargar, Kadipora, Anantnag.
4. Ghulam Mohi-ud-Din Shah s/o Kh. Ali Shah, Bagh Magharmal, Srinagar. ... ... Petitioners.

versus

1. State of Jammu and Kashmir.
2. Inspector-General of Police, Jammu and Kashmir State, Shri D. W. Mehra. ... ... Respondent.s

Criminal Revision No. of 1959.

Revision against the order of Shri N. K. Hak, Special Magistrate, Jammu, date 23rd March 1959.

The petitioners submit as under :—

I. That non-applicants 1 and 2 have instituted enquiry proceedings in the Court of Shree N. K. Hak, Special Magistrate, Jammu, against the petitioners and the following persons u/s 121-A. R. P. C. 120-B, R. P. C. r/w Rule 32 of the J and K Security Rules and Rule 32 of the said Rules :—

1. Sheikh Mohammad Abdullah s/o Sh. Mohd. Ibrahim of Soura, Kashmir.
2. Kh. Ali Shah s/o Ahmed Shah, Bagh Magharmal, Srinagar.
3. Mirza Ghulam Qadir Beg s/o Mirza Nizam Beg, Sarnal, Anantnag.

4. Mir Ghulam Rasool s/o Mir Ahmed Shah, Raj Bagh, Srinagar.

5. Soofi Mohd. Akbar s/o Assad Ullah, Sopore, Kashmir.

6. Pir Mohammad Maqhool Vilgami s/o Pir Hassan Shah, Vilgam, Tehsil Hindwara, Kashmir.

7. Pir Abdul Ghani s/o Pir Ghulam Ahmed Shah, Mohalla Qazi, Anantnag.

8. Mir Mohammad Nazir s/o Hussain Buz, Shaheed Gunj, Srinagar.

9. Ghulam Mohi-ud-Din Hamdani s/o Ghulam Mohd. Zohra, Khankahi Mohalla, Srinagar.

10. Pir Mohammad Afzal Makhdoomi s/o Pir Ahmed Shah, Khanyar, Srinagar.

11. Kh. Mohammad Amin s/o Amir-ud-Din, Ali Guzar, Srinagar.

12. Maqbool s/o Aziz Naik of Check Tareran, Tehsil Baramulla, Kashmir.

13. Jahangeer Khan alias Sabeem Jehangeer s/o Allah Dad of Bagh Methab.

14. Khan Mohammad Khan, Dy. S. P. Pak Intelligence, Rawalpindi, West Pakistan.

15. Sajawal Khan S. I. Pak Intelligence of Hillan, Mori Maidan, Pakistan Occupied Kashmir.

16. Karamat Hussain Shah S. I. Pak Intelligence of Hillan, Pakistan Occupied Kashmir.

17. Kh. Taj-ud-Din S. I. Pak Intelligence of Lipe, Pakistan Occupied Kashmir.

18. Major Asghar Ali Shah, A. S. Pak Intelligence Beaureau.

II. That the accused No. 14 to 18 (both inclusive) cited above, are said to be Pakistan Nationals, who have been impleaded as accused in this case.

III. That it is not contended by the prosecution that

the above foreign Nationals were apprehended in the territories of India, or were ever produced before the Court.

IV. That the doctrine of lex loci cannot apply to the said foreign nationals.

V. That the Special Magistrate issued non-bailable warrants against the said foreigners, recorded evidence of absconsion in regard to them and finally proceeded u/s 512 Cr. P. C. in that behalf.

VI. That the petitioners and other accused took exception to these proceedings, as being against law, and therefore void. They further put in an application on 13-3-1959, praying, inter-alia, that the prosecution be directed to enter nolle prosecui against the said Pakistan Nationals and to disallow the prosecution to refer to any matter oral or documentary, allegedly concerning the said foreign Nationals, in the case against the petitioners and the other accused present in the Court.

VII. That the learned Magistrate by his order dated 23-3-59 rejected both our contentions in the application and continued proceedings is the case.

VIII. That the said order of the learned Magistrate is incorrect and illegal and is causing and has caused serious prejudice and absolute failure of justice to the accused present. The order is, therefore, liable to be set aside by this Hon'ble Court on the following grounds :—

(a) The enquiry against the foreign nationals is illegal and void being without jurisdiction in law.

(b) The foreign nationals not being amenable to the Special Magistrate's jnrisdiction, no process could legally be issued against them.

(c) That in view of the record on the file, the conclusion is illegal and untenable that a "foreigner" can "abscond" from a territory to which he does not belong or where he does not reside.

(d) That the Special Magistrate having no jurisdiction

over the foreign nationals, their trial along with the present accused is vitiated in the eye of law.

(e) That the said foreign nationals belonging as alleged to a country with which India has no Treaty of Extradition, cannot be joined in an enquiry and trial with the citizens of the State.

(f) That the Government Notification No. 15/183/1958 dated 17-5-1958 sanctioning prosecution of the accused present in the court along with the foreign nationals is also bad in law, and, therefore, void in as much as the said notification cannot confer jurisdiction on the Magistrate to hold enquiry against foreigners.

IX. That the said processes and the whole proceedings, calculated as they are, to impute and attribute the alleged acts of the foreign nationals, to the petitioners and other accused present in court, are, therefore, patently malafide and obnoxious to the principle of a fair and just trial.

X. That the petitioners' only interest in the nolle prosecui of the said foreign nationals, is to safeguard the petitioners' own rights and position and to secure to themselves the protection of a fair and just trial guaranteed by law and the constitution. The learned Magistrate's order under revision allows the matter concerning the said foreign nationals to be brought on record. which is bound to prejudice both the public and general atmosphere as well as create serious bias against the accused present in court. This practice is obnoxious to the letter and spirit of the law and the constitution.

PRAYER.

The petitioners, therefore, pray that after calling for and examining the record of the case, the Hon'ble court may be pleased to :—

(a) Quash the order of the learned Magistrate dated 23-3-1959.

(b) Direct the prosecution to enter nolle paosecui against the said Pakistan Nationals.

(c) To disallow the Prosecution to refer, or bring on record, any matters concerning the said Pakistan nationals, in the enquiry against the petitioners and the other accused present in Court.

(d) That proceedings before the Special Magistrate may be stayed pending disposal of this petition. Copy of the order dated 23-3-1959 is attached herewith.

Sd. 1. M. A. Beg.
2. G. Mohammad Chikkan.
3. Mohi-ud-Din.
4. G. M. D. Shah.

Special Jail, Jammu.

In the Court of Qazi Moh'd Nizam Din, B. A., LL. B, H. P., Sessions Judge, Jammu.

(i)

Date of Institution 13-5-1959. Date of Decision 19-6-1959.

1. Mirza Mohammad Afzal Beg son of Mirza Nizam Beg, Anantnag.

2. Kh. Gulam Mohammad Chikan son of Kh. Abdul Aziz Bhat, Karan Nagar, Srinagar.

3. Mohi-ud-Din son of Kh. Abdullah Joo Zargar, Kadipora, Anantnag.

4. Ghulam Mohi-ud-Din Shah son of Kh. Ali Shah, Bagh Magharmal, Srinagar. ... ... Applicants

versus

1. State of Jammu and Kashmir.

2. Inspector-General of Police, Jammu and Kashmir State, Shri D. W. Mehra. ... ... Non-Applicants.

Criminal Revision No. 7 of 1959. Revision against the order of the Special Magistrate, Jammu, dated 23-3-1959.

(ii)

Date of Institution 14-5-1959. Date of Decision 19-6-1959.

1. Mirza Ghulam Qadir Beg s/o Mirza Nizam Beg, Sarnal, Anantnag.

2. Pir Abdul Ghani son of Pir Ghulam Ahmed Shah, Mohalla Qazi, Anantnag.

3. Soofi Moh'd Akbar son of Assad Ullah, Sopore, Kashmir.

4. Pir Mohammad Maqbool Vilgami son of Pir Hassan Shah, Vilgam, Tehsil Hindwara, Kashmir.

5. Mir Mohammad Nazir alias Mistri Nazir son of Hussan, Shaheed Gunj, Srinagar.

6. Pir Mohammad Afzal Makhoomi son of Pir Ahmed Shah, Khanyar, Srinagar .. .... Applicants

versus

1. State of Jammu and Kashmir,

2. Inspector-General of Police, Jammu and Kashmir State, Shri D. W. Mehra. ... .. Non-Applicants.

Criminal Revision No. 8 of 1959. Revision against the order of the Special Magistrate, Jammu, dated 23-3-1959.

Mr. Moh'd Latif for the applicants, Public Prosecutor for the State.

JUDGMENT.

These are two Revision applications directed against one and the same order of the Special Magistrate, Jammu, dated 23-3-1959, this judgment will cover both the applications. A copy shall be placed on the file of the other application.

Mirza Moh'd Afzal Beg and 11 other accused persons, against whom and other accused enquiry proceedings are being held under sections 121-A, 120-B, R. P. C. and Rule 32 of the Jammu and Kashmir Security Rules, filed an application before the Special Magistrate Jammu challenging the jurisdiction of the court to proceed against the five accused persons who are Pakistan Nationals. This application was rejected by the Special Magistrate Jammu by his order dated 23-3-1959. These Revision applications are directed against that order.

The applicants have raised that very objections which they did in the Court of the Special Magistrate, Jammu.

I have heard the learned counsel for the parties and have carefully gone through the record of the case. The learned Special Magistrate has very elaborately discussed the points raised by the applicants and the case law cited on their behalf as well as the reply on behalf of the prosecution along with the case law cited against those points. I need not reiterate them here.

The main objections of the applicants are that the warrants of arrest against the accused Nos. 21 to 25, who are Pakistan Nationals, could not legally be issued by a court of Jammu and Kashmir State nor the court could proceed against them under provisions of section 512 Cr. P. C. in as much as they were not residents of Jammu and Kashmir State and they cannot be held to be absconding from the State to which they do not belong. Their further contention was that even the Government sanction under section 196 Cr. P. C. cannot give power to the Special Magistrate to try foreigners and that tagging the applicants, who are residents of the State, with the five accused, who are Pakistan Nationals, is illegal and vitiates the whole trial. They have cited A. I. R. 1939 Patna 129, A. I. R. 1938 Sindh 46, 1954 Punjab 36 and 1955 S. C. 36. I agree with the learned counsel for the non-applicants that these cases cited on behalf of the applicants are not on all fours in this case. The applicants along with other accused are charged of an offence under section 121-A, R. P. C., beside other offences, and a foreigner can be tried for the offence of conspiracy to commit any of the offences punishable by section 121 and 121-A, because the conspiracy can be done within or without Jammu and Kashmir State as contemplated by section 121-A. I appreciate the point of the learned counsel for the non-applicants that the applicants cannot object the recording of the evidence under section 512 Cr. P. C., because it can be read only against the absconding accused and is not relevant against the applicants. Moreover the offence under section 121-A, R. P. C. is not cognizable offence and the warrants for

the arrest of the five accused, who are Pakistan Nationals, were rightly issued to arm the police with necessary authority to arrest any of those accused who happened to be found in the Jammu and Kashmir State. In the famous Lotus case (1927) S. J. 770, it was held that where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, dose not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction.

I am of the considered opinion that in this case the applicants can jointly be tried with the accused who are Pakistan Nationals and that a court in Jammu and Kashmir State has full powers to try them, as has been held in 1957 S. C. 857.

The order of the Special Magistrate in rejecting the application of the applicants is strictly according to law and I do not find any reason whatsoever to interfere with it in these applications for revision. The applications, therefore, stand rejected. Let the applicants be informed of this order through the Superintendant, Special Sub-Jail, Jammu. Announced.

Jammu :
Dated 19-6-1959.

Sd. Sessions Judge,
Jammu.

In the High Court of Jammu and Kashmir, Srinagar.

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1. Mirza Mohammad Afzal Beg s/o Mirza Nizam Beg, Anantnag,
2. Kh. Gulam Mohammad Chikkan s/o Kh. Abdul Aziz But, Karan Nagar, Srinagar.
3. Mohi-ud-Din s/o Kh. Abdullah Joo, Kadipora, Anantnag.

4. Kh. Gulam Mohi-ud-Din Shah s/o Kh. Ali Shah, Bagh Magharmal, Srinagar ... ... Applicants

versus

1. State of Jammu and Kashmir.
2. Inspector-General of Police, Jammu and Kashmir State, Shri D.W. Mehra ... ... Non-applicants.

Criminal revision No. 37 of 1959.

Revision application against the order of Shri N. K. Hak, Special Magistrate, Jammu, dated 23rd March, 1959 and the order of the learned Sessions Judge, Jammu, dated 19th June 1959.

To,

The Hon'ble Chief Justice and His Companion Justices of the High Court of Jammu and Kashmir.

This humble petition of the above named petitioners most respectfully showeth :—

1. The non-applicants 1 and 2 cited above instituted inquiry proceedings in the Court of Shri N. K. Hak, Special Magistrate, Jammu, against the petitioners and the following persons u/s 121-A, R. P. C, 120-B, R. P. C., r/w 32, J & K Sccurity Rules :—

(1) Pir Mohammad Maqbool Gilani s/o Mir Hassan Shah of Khanyar of Srinagar.
(2) Kh. Ali Shah s/o Ex-Commissioner, Jammu and Kashmir State s/o Ahmad Shah of Bagh Magarmal, Srinagar.
(3) Mirza Gulam Qadir Beg s/o Mirza Nizam Beg, Anantnag.
(4) Mir Gulam Rasool s/o Mir Ahmad Shah, Rajbagh, Srinagar.

(5) Sofi Mohammad Akbar s/o Assadullah of Sopore.

(6) Pir Mohammad Maqbool Wilgami s/o Pir Hussain Shah of Wilgam, Handwara.

(7) Mirajuddin s/o Lal Din, Salasan Boniyar, Tehsil Uri.

(8) Attaullah Beg s/o Saidullah Beg, Baramulla.

(9) Zaman Parey s/o Samad Parey, Balkote, Tehsil Uri.

(10) Pir Abdul Gani s/o Pir Gulam Ahmad, Anantnag.

(11) Mir Mohammad Nazir alias Mistri Nazir, Srinagar.

(12) Gulam Mohi-ud-Din Hamdani s/o Gulam Mohammad Zohra, Srinagar.

(13) Pir Mohammad Afzal Mukhdoomi s/o Ahmad Shah, Srinagar.

(14) Maqbool Naik s/o Aziz Naik, Chak Tariran, Baramulla.

(15) Jahangir Khan alias Saleem Jahangir s/o Allah Dad of Bagh Mahtab, Srinagar.

(16) Kh. Mohammad Amin s/o Amiruddin, Srinagar.

(17) Khan Mohammad Khan, Dy. S. P. of Intelligence, Rawalpindi, West Pakistan.

(18) Sajawal Khan, S. I. Pak Intelligence of Hillan, Morimaidan, (P. O. K.)

(19) Karamat Hussain Shah S. I. Pak Intelligence of Hillan.

(20) Kh. Tajuddin, S. I. Pak Intelligence of Lipa (P. O. K.).

(21) Major Asghar Ali Shah, A. S. P. of Intelligence Bureau.

2. The said prosecution was sanctioned by the Government of Jammu and Kashmir under their order No. IS-183 of

1958, dated 17-5-1958. The Special Magistrate, Shri N. K. Hak was appointed under section 14 Cr. P. C. vide Government order No. 31-P/58 dated 17th May 1958.

3. The accused in the said inquiry mentioned at Nos. 17 to 21 (both inclusive) are said to be Pakistan Nationals residents and officials of that foreign territory, as alleged by the prosecution.

4. The said foreign nationals were neither apprehended in the territories of India nor were they ever produced before the said Court of Shri N. K. Hak, Special Magistrate. Proceedings against them are going on in absentia.

5. There is no Treaty of Extradition between the two sovereign States of India and Pakistan, which in law could assist the production of alleged criminals from a foreign country.

6. On presentation of the "Complaint," showing the said foreign nationals as accused persons, the Special Magistrate issued non-bailable warrants against the said fareign nationals, recorded evidence of absconsion in regard to them, and finally took proceedings u/s 512 of Cr. P. C. in their behalf.

7. The petitioners and other accused persons present in Court took exception to these proceedings as well as the very jurisdiction of the said Court.

8. The learned Magistrate, however, by his order dated 23-3-1959, rejected the defence contention and continued proceedings in the case.

9. Thereupon the petitioners preferred a revision petition against the said order to the learned Sessionas Judge, Jammu. The other accused present also filed a revision petition to the learned Sessions Judge against the said order.

10. The learned Sessions Judge rejected the petitioners, revision petition by his order dated 19-6-1959, copy of which was supplied to the petitioners on 29-6-1959, in the Special Jail, Jammu.

11. Against the said order of the learned Sessions Judge, as well as against the order of the Special Magistrate dated 23-3-1959, the present petition is filed before this Hon'ble Court.

12. Both the said orders are against law, irregular and incorrect, and have caused grave prejudice to the petitioners. Being void in law, the orders may kindly be set aside on the following grounds amongst others :—

(a) That the inquiry being against foreign nationals now beyond the territory of India, is without jurisdiction and therefore void in law.

(b) That the foreign nationals, as at present, not being amenable to the Special Magistrate's jurisdiction, any process issued against them is bad and, therefore, null and void.

(c) That the Special Magistrate being, in the circumstances of the case, without jurisdiction over the foreign nationals, their inquiry or trial along with the petitioners is bad in law and therefore vitiated.

(d) That in view of the record on file, the Special Magistrate's conclusion is illegal and untenable in law that a "foreigner" could "abscond" from a territory which is foreign to him or where he does not reside.

(e) That the said foreign nationals belonging as they do—as alleged by the non-applicants—to a country with which India has no Treaty of Extradition, their joinder with the petitioners, as the citizens of the state, is in the circumstances of the case, illegal and, therefore, liable to cancellation.

(f) That the said foreign nationals not having been apprehended within the jurisdiction of the Special Magistrate's Court, nor having been produced in the said Court, the doctrine of lex loci cannot be invoked so as to confer jurisdiction on the Court.

(g) That the said Court being without jurisdiction in regard to the said foreign nationals, no evidence can be recorded against them, as such, and no such evidence can, therefore, be read against the other accused persons.

(h) That in the circumstances referred to above both the Government Notification No. IS-183 dated 17-5-1958, Government order No. 31-P/58 dated 17-5-1958, as well as the "Complaint" dated 21-5-1958, are vitiated and therefore bad in law.

(i) That the said Notification No. IS-183 dated 17-5-1958, and the Government order No. 31-P/58 dated 17-5-1958, are ultra vires of S. 196, Cr. P. C., S. 14, C. P. C. respectively and are void and liable to cancellation.

13. In the light of the foregoing, the whole proceedings, calculated as they are to impute the alleged acts of the foreign nationals to the accused persons present in the Court, are therefore patently malafide and obnoxious to the principles of fair and just trial and those of natural justice.

14. The said proceedings as well as the notifications and the complaint make invidious discrimination against the petitioners and thereby render negatory their fundamental rights of equality before law as well as the equal protection of law.

15. The petitioners' only interest in the nolle prosecui of the said foreign nationals is to safeguard the petitioners' own rights and position and to secure to themselves the protection of a fair and just trial, guaranteed by law and the constitution.

16. The Special Magistrate's and the learned Sessions Judge's orders under revision allow the matter concerning the said foreign nationals to be brought on record, which will prejudice both the mind of the Court and general public against the accused persons present in Court. This practice is obnoxious to the letter and spirit of law and the constitution.

PRAYER.

The petitioners therefore pray :—

That after calling for and examining the record of the case Criminal File No. 1 of 1958, from the Special Magistrate, Jammu, this Hon'ble Court may be pleased to :—

(a) Quash the order of the Special Magistrate, dated 23-3-1959 and that of the learned Sessions Judge, Jammu, dated 19-6-1959.

(b) Direct the said Magistrate, if and when the proceedings are rectified in accordance with law, not to allow prosecution to refer to or to bring on record any evidence or matter alleged to concern the said foreign nationals in the inquiry against the petitioners.

(c) Direct the prosecution to enter nolle prosecui against the said foreign nationals.

(d) Declare Government Notifications Nos. IS-183 dated 17-5-1958 and 31-P/58 dated 17-5-1958, ultra vires of S. 196 and S. 14, Cr. P. C., respectively, and therefore void.

(e) Dismiss the complaint dated 21-5-1958 and discharge the accused.

(f) Grant any other relief that in law and justice may be thought fit.

The petitioners further pray that as the matter involves grave and vital issues of law of serious consequences, the Hon'ble Court may kindly be pleased to stay proceedings before the Special Magistrate's Court, pending disposal of this matter.

A certified copy of the learned Sessions Judge's said judgement is enclosed herewith.

Sd. 1. M. A. Beg.
2. Gulam Mohammad Chikkan.
3. Mohi-ud-Din.
4. Mohi-ud-Din Shah.

Special Jail, Jammu :
Dated 15th July 1959.

Copy of letter dated 15th July from Mr. M. A. Beg and others to Dy. Registrar High Court of Judicature, Srinagar.

Special Jail, Jammu.
15th July 1959.

Dear Sir,

Herewith is enclosed revision application, with an affidavit duly attested, for submission to the Hon'ble Court.

The petitioners being unrepresented, they have to argue their case personally. It is therefore requested that intimation about the date of hearing may please be sent to the Superintendent, Special Jail, Jammu, about a week in advance of the date with the direction to remove the petitioners to Srinagar four or five days before such date. This is necessary in view of the uncertain road conditions in the rainy season, which often result in breakdown of traffic. The petitioners also desire to be in Srinagar a couple of days ahead in order to make preparations for the case.

The submissions may kindly be brought to the notice of the Lord Chief Justice, and his orders conveyed to the petitioners.

An additional copy of the petition, enclosed herewith, is meant for the Advocate General. The same may be kindly transmitted to him.

Yours faithfully

Sd. 1. M. A. Beg.
2. Ghulam Moh'd Chikan.
3. Mohiuddin.
4. Mohiuddin Shah.

Enclousures : Four.

1. The petition.
2. An affidavit.
3. Certified copy of the Sessions Judge's order dated 19-6-1959.
4. A Copy of the petition for Advocate General.

Deputy Registrar,
High Court of Judicature,
Srinagar.

11. That one of the petitioners namely Mirza Afzal Beg is reported to be having attacks of renal colic and the proceedings in the Court of Special Magistrate, Jammu, had to be adjourned more than once on account of his illness and eventually on 3-8-1959, on the report of the physician (attending on him) that he was unable to attend the Court for 10 days, the proceedings had to be suspended. Keeping in view his state of health it will not be desirable to bring him over to Srinagar.

12. That the matters raised in the revision petition are not of urgent importance and revision petition can be heard at Jammu during the next Jammu session of the Hon'ble High Court.

13. That the petitioners have been approaching even the Hon'ble Supreme Court of India on one pretext or the other and although three of their petitions are still pending there, the Hon'ble Supreme Court has not stayed the proceedings in the Court of Special Magistrate, Jammu.

14. That in case expeditious disposal of the revision petition is deemed necessary, the case may kindly be taken up and heard at Jammu on any day convenient to the Hon'ble Court under the provisions of section 101 (2) of the Constitution of Jammu and Kashmir. This course will substantially meet the prayer of the accused petitioners and would also save a lot of expenditure and delay which may otherwise be involved in case the revision petition is heard at Srinagar.

15. That the prayers of the petitioners are misconceived and are not tenable. It is, therefore, submitted that the prayers made by the petitioners with regard to stay of proceedings and personal appearance in Srinagar may kindly be disallowed.

State of Jammu and Kashmir
and another.
Through
Sd.
(JASWANT SINGH)
Advocate General.
13-8-1959.

Note :—Objections submitted above are without prejudice to the objections on the merits of the revision petition which will be submitted at the hearing.

Sd. *Advocate General.*

In the High Court of Judicature, Jammu and Kashmir State, Srinagar.

Criminal Revision No. 37 of 1959.

MIRZA MOHAMMAD AFZAL BEG s/o MIRZA NIZAM BEG r/o ANANTNAG, KASHMIR, AND THREE OTHERS.

versus

STATE OF JAMMU AND KASHMIR AND ANOTHER.

To,

The Hon'ble Chief Justice and his companion Justices of the High Court of Jammu and Kashmir.

May it please your Lordships,

The respondents named above have filed objections to the prayers of the petitioners for stay of proceedings in the Court of Special Magistrate, Jammu, and sending for the petitioners in advance of the date of hearing. Copy of these objections was handed over to the petitioners today, the 20th of August 1959, in the Special Jail, Jammu. In opposition and in regulation of the said objections the petitioners submit the following reply :—

1. Paragraphs 1 to 7 of the objections relate to the merits of the revision application of the petitioners who reserve their right to make appropriate submissions on merits at the hearing. Without prejudice to the above, the petitioners refute the contentions made in these paragraphs.

2. The right of a petitioner being heard at judicial proceedings is a fundamental right and a very basic principle of natural justice. The attitude taken by the respondents to resist this right, is typical of the prosecution in this case, and tantamounts to denial of justice.

3. The respondents know that the petitioners, being without any counsel to represent them, have been defending themselves before this Hon'ble Court and subordinate Courts personally. In the circumstances, refusal of the petitioners simple and innocuous prayer for personal appearance before the Hon'ble High Court, to argue and conduct the proceedings would grossly be violative of principles of justice, equity and good conscience. Such a stand is, to the knowledge of petitioners, unprecedented in a case where the opposite party is the State whose duty it is in law to protect the legitimate rights of even an accused person.

4. The petitioners crave to recall the precedents of the Hon'ble High Court wherein it was pleased to summon last year, from Kud to Srinagar, petitioner No. 1 in order to appear in his transfer application. The Hon'ble Court also allowed Sheikh Moh'd Abdullah to be present before it in December last to assist his counsel in the proceedings of his transfer application. Furthermore, the petitioners have personally appeared to argue and conduct their petition number of times before the Sessions Court and this Hon'ble Court in Jammu. On all these occasions, merits of their petitions were argued personally in the presence of Respondents. No objection was ever, or could be, taken for such personal appearance. In the light of this practice, rightly and justly established by this Hon'ble Court consideration of the merits of the petition at the back of the petitioners, would not only be violative of those precedents but will also hit the petitioners very hard and cause them unmerited damage and injustices.

5. The petitioners, craving reference to their letter to the Deputy Registrar of the High Court, dated 14-7-59, submit that what was prayed for was a week's intimation to the Superintendent Jail in advance of the date of hearing and a

request for the removal of the petitioners to Srinagar three or four days before such date. The Respondents are not correct in attributing to the petitioners the request of sending for them a week in advance of the date.

6. Without prejudice to submissions made above the petitioners state as under :—

(a) With regard to para 1 of the Respondents' said objections, the petitioners refute the allegation that their petition is intended to delay or obstruct the proceedings.

(b) The allegations made in para 2 of the objections are refuted and it is submitted that the petitioners have a good case to make out at the hearing.

(c) In regard to allegation made in para 3, the petitioners submit that continuance of proceedings pending disposal of their petition will seriously and naturally bias the learned Magistrate against the petitioners. Should the Hon'ble Court be finally pleased to quash the proceedings of the said Magistrate, the petitioners naturally apprehend that the effect on the mind of the said Magistrate cannot be washed off. Traces of bias are bound to linger on in mind, causing consequential prejudice to the accused petitioners.

(d) The contentions made in para 4 of the said objections, other than references to sections of Ranbir Penal Code Rule of Security Rules, are wrong and incorrect. The impact of "evidence" being recorded without jurisdiction and hence inadmissible in law and serious prejudice to the petitioners has been brought out in the revision petition. This case be elaborated and supported by law at the hearing, which right the petitioners reserve.

(e) In regard to contention in para 5, the petitioners

question the applicability of the principle of law referred to here, to the circumstances of the case pending before the Hon'ble Court.

(f) The petitioners make the same submission as above in reference to the principle broadly mentioned in para 6.

(g) The petitioners refute the insinuation made in para 7, as baseless and incorrect. The petitioner's object " to visit to Srinagar" is solely to place their case before the Hon'ble Court. It is hardly fair and just to impute unfounded motives.

(h) In regard to contention made in para 8, the petitioners beg to recall that last year about 5 or 6 times, 7 of the accused in the conspiracy case were moved between Srinagar and Kud and Jammu in connection with the Judicial proceedings. Transport arrangements can as well be made. Besides, fundamental and basic rights of the petitioners cannot be sacrificed at the altar of convenience of the prosecution.

(i) In regard to submission made in para 9, the petitioners say that whatever damage might have been caused to Srinagar-Jammu Road by the previous rains, the road has now been declared by the Government open to free traffic. To the knowledge of the petitoners people now come and go on this road in vehicles regularly. The petitioners trust that the authorities have not declared the road open to traffic even though "considerable risk is involved," in the journey as alleged.

(j) As regards "restriction" referred to in para 10, the requisite permission can be obtained from the competent authority, if necessary, and the state should have no difficulty in getting it. In the past prisoners were flown between Srinagar and

Jammu several times. It is invidious to make a discrimination in the case of petitioners who, however, are not particularly fond of flying, if land transport arrangements can be made.

(k) In regard to contention made in para 11, the petitioner No. 1 is grateful for the implied concern—if it so be—, for his helth indicated in this para. He is not aware that the trouble he was sufferring from "renal Colic" as alleged. He is, however, quite fit now and attends the court where he daily conducts his defence and is quite fit to travel. The petitioners pray that this reason of the Respondents, so anxiously sought out, may not be allowed to prevail.

(l) As regards contention made in para 12, the petitioners have made out the urgency and importance of the subject matter of their petition in their revision application. While reserving the right of their argument at the hearing, they submit that the delay in disposal of the matter will defeat justice.

(m) In regard to contention made in para 13, the petitioners submit that the Hon'ble Supreme Court has, as must be presumed in law, decided every petition according to the merits involved in each. To the knowledge of the petitioners that Hon'ble Court has not ruled that the petitioners should never, or in a case like the present revision petition, be granted stay. With utmost respect, therefore, the petitioners submit that references to previous petitions are irrelevant and void of the mark in this connection.

(n) Reference to Section 101 (2) made in para 14 is irrelevant. Those provisions have no application to the case in hand, and the petitioners can successfully make out the inapplicability of

those provisions to the case in hand. The suggestion made by the Respondents is, moreover, unprecedented. The interpretation sought to be put on the provisions of the said section is most untenable and incorrect. The petitioners reserve the right to make appropriate submissions at the hearing about the true construction interpretation and effect of these provisions.

7. In view of the above, the petitiners pray that the objections of the Respondents be overruled their request in para 4 be rejected and the prayer of the petitioners, both for stay and personal appearance, be kindly granted.

Sd. 1. M. A. Beg.
2. Gulam Mobd Chikkan.
3. Mohiuddin.
4. Gulam Mohiuddin Shah.

Attested.
Sd. Supdt. Spl. Jail, Jammu.
Special Jail, Jammu.
Dated 20th August 1959.

Copy of telegram dated 11-9-1959 from Mohd. Afzal Beg to Justice, Srinagar.

Light impression of the seal of Post Office.

402 18 2 SK

OLi Jammu T II 45

Justice Sk

On tenth received information from mr tikoo advocate that hearing regarding applicability section 101 constitution fixed 4th sept in mohdafzal beg *versus* state aaa pray fresh date and solicit permission a rago this point personally aaa petitioner unrepresented.

Mohdafzal Beg

[Put up with the case on the date of hearing. Sd. Deputy Registrar 12-9-1959. Initial Deputy Registrar 12-9-1959].

Copy of letter dated 12th Sept. 1959 from Mr. M. A. Beg and others to Deputy Registrar, High Court of Judicature, J & K.

Special Jail, Jammu.
12th September 1959.

Dear Sir,

In reference to the petition for personal appearance before the Hon'ble High Court, submitted by me and by Messrs Gulam Mohd Chikan, Gulam Mohiuddin Shah and Mohiuddin, I received a letter from Mr. Onkar Nath Tikoo, Advocate, from the persual of which it appears that the issue before the Hon'ble Court at the present moment, is whether u/s 101 of the Kashmir Constitution, our revision petition can be heard at Jammu forthwith, instead of bringing over the petitioners to Srinagar for such hearing. Further, it appears that Mr. Tikoo has been asked to appear and argue this point of law.

In the first instance, I would like to point out that Mr. Tikoo's letter conveying the above intimation was received by me on the 10th of September, the letter being dated 28th August, from Srinagar. The letter states that the date of hearing was fixed on the 4th September. Thus the date had already expired when I received the intimation.

On 11th September 1959 I made the following submission in a telegram to Hon'ble Lord Chief Justice :—

"Justice Srinagar

"On tenth received information from Mr. Tikoo Advocate that hearing regarding applicability section 101 constitution fixed fourth september in Mohd Afzal Beg *vs* State XXX pray fresh date and solicit permission argue this point personally XXX petitioner unpresented.

Mohdafzal Beg."

The petitioners in their reply of 28-8-1959, made against the rejoinder of the respondent, have contested application of Section 101 of the Kashmir Constitution to the case in hand. They stick to that view and have sought permission to make

submissions to the Hon'ble Court personally at the hearing.

Besides, it appers from Mr. Tikoo's said letter that he is of the view that Section 101 of Kashmir Constitution does apply to the case in hand. This view being at variance with that held by the petitioners it would hardly safeguard the interest of the petitioners to expect him to advance the view of the former. Besides, he does not represent the petitioners who have been personally conducting their defence both in the Magistrate's court, as well as the higher courts.

In these circumstances you will kindly place these submissions before the Hon'ble Lord Chief Justice with the prayer on my behalf as well as on behalf of other three petitioners to be pleased to summon the petitioners to Srinagar for submitting personally their arguments on the issue of applicability of Section 101 of the Kashmir Constitution.

Yours faithfully
Sd. M. A. Beg
We endorse the above request.
Sd. 1. Gulam Mohd Chikkan.
2. Mohiuddin Shah.
3. Gulam Mohiuddin.

High Court of Judicature, Jammu and Kashmir.

Present :
The Hon'ble Syed Murtaza Fazl Ali, Judge.
Criminal Revisions No. 37 and 39 of 1959.

MIRZA MOH'D AFZAL BEG AND OTHERS,
Versus
STATE OF JAMMU AND KASHMIR AND ANOTHER.

MIR GHULAM RASOOL AND OTHERS
Versus
STATE OF JAMMU AND KASHMIR AND ANOTHER.

(Revisions against the order of the Sessions Judge, Jammu, dated 19th June 1959.)

Petitioners with Mr. Moh'd Latif, M/S Nageshwar Prasad, Surrinder Nath, R. K. Kaul and Suraj Prakash.

These two applications in revision are directed against an order of the Special Magistrate, Jammu, dated 23rd March 1959 overruling the objections taken by the petitioners with respect to the recording of deposition of certain witnesses under the provisions of section 512 of the Code of Criminal Procedure.

The petitioners who are being proceeded with in the Court of the Special Magistrate under sections 121-A, 120-B and other sections of the Ranbir Penal Code filed certain objections before the learned Magistrate challenging the order of the Magistrate regarding recording of evidence of certain witnesses on the ground that as the conditions laid down in section 512 of the Code of Criminal Procedure were not satisfied and as the Court was not competent to try the five accused, who are said to be absconding the Court had no jurisdiction to record the evidence in their absence. The learned Magistrate rejected the objections and thereafter the petitioners moved the Sessions Judge in revision for making a reference to this Court in order to quash the order impugned. The Sessions Judge also rejected the revision application, hence the two revision applications before this Court. The petitioners prayed to the Court that they should be permitted to appear in person so as to enable them to argue the case and on an application by the Advocate General detailing the reasons for inability to produce the petitioners at Srinagar by an order of this Court, this case was directed to be taken up at Jammu by me. Sanction of the Sadar-i-Riyasat under section 101 (2) of the Constitution of the State has also been taken for this purpose.

A preliminary objection has been taken by Mr. Beg to the effect that this Court has no jurisdiction to hear the present case at Jammu and that such a course is not contemplated by section 101 (2) of the State Constitution. In my opinion the

objection raised is completely devoid of any force. Subsection (2) of section 101 of the Constitution of the State runs as under :—

> "The Chief Justice shall with the approval of the Sadar-i-Riyasat, determine the number of Judges who shall sit from time to time at Jammu and at Srinagar for such period as may be deemed necessary."

A plain reading of the subsection clearly shows that the Chief Juistce has got the power to direct a Judge or a number of Judges to sit from time to time at Jammu and at Srinagar for such period as may be deemed necessary. Mr. Beg wanted me to interpret this subsection as implying that it can only be done for a long period without any break and in order to dispose of a series of cases. I am unable to agree with this contention, because if this interpretation is given effect to then it would amount to adding something into the subsection which is not there. The subsection does not limit the discretion of the Chief Justice to a particular case or cases. Nor does the subsection impose any restriction on the period to be fixed. Under this subsection, therefore, the learned Chief Justice is entitled to direct that a case or any number of cases be heard at Jammu and at Srinagar by a Judge or such other Judges as he may depute for the purpose. The words 'from time to time' also merely indicate that this course can be resorted to whenever it is felt necessary and do not imply regular repetition of a process as contended for by Mr. Beg. The preliminary objection is, therefore, overruled.

On the merits of the petitions Mr. Beg contended, in first place, that as the warrants of arrest against those of the absconding accused who resided in Pakistan could not be issued by the learned Magistrate and could not be executed under the provisions of section 82 of the Code of Criminal Procedure, the question of absconding as contemplated by section 512, Cr. P. C. did not arise. Mr. Beg in support of his contention relied on a decision of the Patna High Court in case Haramohan Pathaik v. Emperor reported in A. I. R. 1939 Patna 129. I have carefully gone through that decision and in my opinion

it does not help the petitioners at all so far as the interpretation of section 512, Cr. P. C. is concerned. That was a case whereby a petition under section 491, Cr. P. C. the arrest of the accused under a warrant issued by a Magistrate of a native state to certain authorities in British India was questioned. Their Lordships of Patna High Court held that as the warrant was directed specifically to the Railway police in British India the warrant was illegal and, therefore, the arrest also was illegal. Their Lordship, however, supported the arrest of the petitioner in that case on other grounds. In the present case the warrants issued by the learned Magistrate are not directed to any authority in Pakistan. They merely give the address of the absconding accused and are not directed to any officer in Pakistan to execute them there. On the other hand, Mr. Nageshwar Prasad, senior counsel for the prosecution, has contended that the warrants were issued by the Magistrate in order to arm the police with the necessary authority to arrest the accused person, if and when they enter the State of Jammu and Kashmir. Again, in my opinion the question of issue of warrant of arrest has got nothing to do with section 512, Cr. P. C. It may be that a person may abscond knowing that a complaint has been filed against him in court even without the issue of any warrant or process against him. Such a case also falls within the ambit of section 512, Cr. P. C. There is, therefore, no relation between the determination of the question as to whether the accused have absconded as cotemplated by section 512, Cr. P. C. and the issue of warrant of arrest and its execution under the provisions of the Code of Criminal Procedure. Mr. Beg was unable to cite any authority to show that if the Court is powerless to issue warrant of arrest against certain accused, then even if the accused is absconding otherwise section 512, Cr. P. C. will have no application. This contention must, therefore, be overruled.

It has then been contended by Mr. Beg that the prosecution did not lead reliable evidence to show that the warrant was in face executed at least on those absconding accused who resided in the territory which is known as the Pakistan occupied territory and forms part of the Jammu and Kashmir State as

envisaged in the Constitution of Jammu and Kashmir. This in my opinion is a question which is based on appreciation of evidence. The sufficiency or otherwise of the materials before the learned Magistrate for coming to a finding on the question as to whether the accused are absconding cannot be gone into in revision. I might mention, however, that the learned Magistrate in his order dated 25-10-1958 has come to the following finding:

"It appears from their evidence that the above mentioned accused persons have absconded and that there is no immediate prospect of their being arrested."

This finding of the learned Magistrate is based on the statements given before him by certain witnesses which were evidently accepted by the learned Magistrate. In my opinion it is not open to me in revision to go behind this finding of fact and it is, therefore, established on the finding of the Magistrate that the accused were absconding and that there was no immediate prospect of arresting them. In this state of the finding there can be no doubt that section 512, Cr. P. C. would certainly apply and the Magistrate would be justified in recording evidence in absence of the absconding accused for the purpose contemplated by section 512, Cr. P. C.

It was next contended by Mr. Beg that there is another essential ingredient of section 512, Cr. P. C. that the Court must be competent to try the absconding accused. Developing this argument Mr. Beg as also Mr. Latif contended that as the absconding accused, who were Pakistan nationals, were not apprehended or produced before the Court, no proceedings could be started against them and the learned Magistrate was not competent to try them until they were actually before him. The contention on first reading seems to be attractive but on a close scrutiny the contention is shorn of any substance. The question of trial of the absconding accused cannot and has not arisen at this stage. Mr. Nageshwar Prasad has fairly conceded that there is no question of the absconding accused being tried now. Moreover, the evidence to be recorded under section 512, Cr. P. C. is not a part of the actual

trial of the absconding accused. Section 512, Cr. P. C. itself makes it very clear that such evidence may be used if and when the accused are to be tried or committed for trial provided certain conditions mentioned therein are satisfied. Therefore the question of the Magistrate's competency to try in a broader sense cannot be considered at this stage. What the section really means is that the competency should be patent on the face of the proceedings. In other words, it must be shown that the offence with which the accused are charged has taken place within the jurisdiction of the Court or is triable by the Court as provided for by sections 179 to 182 of the Code of Criminal Procedure. Once this is done, the Court is certainly competent to try or commit for trial such abscoding accused. The words appearing in section 512 "Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence, with which he is charged" clearly indicate that the section does not relate to an actual trial which is to take place at a future stage. Therefore it will be contradiction in terms to judge competency of the court to try the accused in a broader sense or in the sense suggested by Mr. Beg. In the present case it is not disputed that the offence of conspiracy for which the petitioners as also the absconding accused are being prosecuted took place in the State of Jammu and Kashmir. This being the position the court of the Special Magistrate which exercises jurisdiction in the entire State is certainly competent to try the absconding accused.

Mr. Beg fairly conceded that merely by virtue of the fact that the absconding accused were foreign nationals they could not escape trial. It is, therefore, not necessary for me to refer to the decision of the Supreme Court reported in A. I. R. 1957 Supreme Court 857. Mr. Beg laid stress only on the fact that the accused must be apprehended or produced before the Court. I have already rejected this contention of Mr. Beg.

Moreover, it seems to me that the question raised by the petitioners is purely academic and futile at the present moment. Even if the evidence recorded under Section 512, Cr. P. C.

suffers from certain legal infirmities it is really to be used against the absconding accused and affects them. It is only the absconding accused persons who are entitled to object to the recording of this evidence under section 512, Cr. P. C. and the petitioners have no *lucus standi* to challenge the recording of this evidence. The evidence of the four witnesses which has been recorded under section 512, in my opinion, is of a dual character. In the first place, this evidence recorded under section 512, Cr. P. C. is to be used against the absconding accused if and when occasion arises. In the second place, such evidence is a part of the general evidence that is being led by the prosecution to prove the charge of conspiracy against the present petitioners. Surely the prosecution cannot be denied the right to prove the charge of conspiracy by leading such evidence as they choose to do. The question, however, as to how and to what extent the evidence is reliable or admissible against the petitioners has not arisen now and will naturally arise after all the evidence is led and the Magistrate proceeds to determine the question as to whether there are sufficient grounds to commit the accused for trial. At that stage it will certainly be open to the petitioners to assail the evidence on whatever grounds they like. In this connection I might mention that the learned Magistrate has devoted a good part of his judgment to the question of application of section 10 of the Evidence Act. In my opinion it was not at all necessary for the Magistrate to have made these observations at the present stage. As, however, the Magistrate has left this question open the petitioners cannot possibly have any legitimate grievance. I might, however, observe that the learned Magistrate at the proper stage will make an independent approach to this question and will not allow himself to be influenced by whatever he has stated in the order impugned.

Both Mr. Beg and Mr. Latif have stated before me that they are not going to press the question of misjoinder at present but reserve their right to raise this question if and when an occasion arises.

The result is that all the contention raised by Mr. Beg

and Mr. Latif fails. The applications are accordingly dismissed and the rule is discharged.

Jammu :

24th September 1959. Sd. S. MURTAZA FAZL ALI.

CHAPTER VII

In the Conrt of Special Magistrate, Kud.

STATE *vs* MOHD. AFZAL BEG AND OTHERS.

Offence under S. 121-A, 120-B, R. P. C. etc.

Sir,

Today when the learned Public Prosecutor revealed that Accused No. 2 and 16 have not been served, and that the accused Nos. 18, 19, 20 to 25 were absconding, he did not disclose to the court regarding the whereabouts of accused No. 11 and 12.

2. That the defence counsel submitted to the Hon'ble Court regarding the whereabouts of No. 11 and 12, the Government Prosecutor disclosed that they have turned up approvers.

3. That when the information was elicited by the defence counsel regarding the costody of the approver and the authority which is detaining them, the learned Goverment Prosecutor informed the court that the information on this point is contained in the file of this Hon'ble Court.

4. This Hon'ble Court then informed the defence counsel that the approvers are in custody under his orders. The defence dose not know up to this time the place of their detention.

5. That under law, the custody of approver shoud be absolutely judicial and far from any police influence.

6. It is respectfully prayed that exact and complete information reagarding the custody and its character be disclosed to the defence, as the defence genuinely apprehends that the police have not ceased to exercise their harassing influence over them. Further it is prayed that they be transferred to Kud subsidiary Jail where the inquiry is at present being held, and where this honourable court can exercise direct supervision.

MIR GHULAM RASOOL Accused,
Through.

Date 11-6-58.

Sd. (D. R. PREM)
Senior Advocate.

Counsel for the Prosecution says that these persons are in judicial custody and that arrangements will be made to produce them when required to do so and at the proper stage. Mr. D. R. Prem, Counsel for the accused feels satisfied with this assurance. This may therefore be filed.

Announced.
11-6-1958.

Sd. N. K. HAK,
Special Magistrate,
Magistrate 1st class,
Jammu & Kashmir.

In the Court of Special Magistrate, Jammu.

STATE *vs* M. A. BEG AND OTHERS

The humble petition of the petitioners showeth :—

1. That the alleged approver Ata Ullah Beg has been examined by the prosecution and is under cross-examination since yesterday the 25th May 1959.

2. That from the anxiety that the witness shows while he is under cross-examination today to volunteer statements apparently to rectify some statements that he made yesterday to qnestions in cross-examination. It is clear that the prosecution has tampered with the witness by warning him about the consequences of some of his said statements made yesterdayr.

3. It is the apprehension of the accused persons, therefore, that he will be tampered again by the police and the prosecution, if he is allowed to go to his usual place of custody or detention, today after cross-examination which will remain incomplete.

4. It is the interests of justice, therefore, to arrange the custody of the witness under the direct supervission of the court for which arrangements may kindly be made.

PRAYER.

The accused, therefore, pray that arrangements be kindly made for the custody of the witness Ata Ullah Beg under the direct supervision of this Hon'ble Court until such time that

the cross-examination is over. It is further prayed that the cross-examination of the witness be kept in abeyance till arrangement for the custody of the witness under the direct supervision of this Hon'ble Court is made.

Sd. 1. M. A. Beg.
2. Mir Ghulam Rasul.
3. Ghulam Mohd. Chikkan.
4. Kh. Ali Shah.
5. Ghulam Mohi-ud-Din Shah.
6. Mohi-ud-Din Zargar.

Dated 26 May, 1959.

Presented by Mr. Mani.

This may be passed on to prosecution for objections if any.

Sd. N. K. HAK,
Special Magistrate,
Magistrate 1st Class, J and K.

In the Court of Special Magistrate, Jammu.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS.

The petitioners beg to submit as under :—

1. That the alleged approver Ata Ullah Beg has revealed in his cross-examination that he was kept in Kothi Bagh Sub-Jail under the influence and custody of the police till he was produced in this court on 21st May 1959. Such influence is bound to continue if he is returned to any lock-up in Srinagar.

2. That the witness is liable to be tampered by the police as regards his statement in the cross-examination if he is sent back to Kothi Bagh Sub-Jail and as generally apprehended by the accused approvers.

3. This Hon'ble Court had already directed that during the cross-examination the witness shall be escorted by

the Jammu Police, and that he shall be kept in Judicial lock-up Central Jail, Jammu, separate from others and that no police officer shall have any access to him.

4. It is submitted that in the interest of justice the witness should not be sent back to the Kothi Bagh sub-jail or Srinagar where he will again be under the influence of the Kashmir police other authorities to the detriment of the accused.

PRAYER.

It is therefore prayed that this Hon'ble Court may kindly direct :—

(i) That the witness Ata Ullah Beg shall be escorted by the Jammu Police and lodged in the Central Jail, Jammu.

(ii) That he shall be kept separate from others.

(iii) That no police officer or other authority shall have any access to him at any time during the pendency and the final disposal of the case, and

(iv) That he shall not be removed to any place other than Central Jail without notice to the accussed and without the permission of the Hon'ble Court.

Sd. 1. M. A. Beg.
2. Mir Ghulam Rasul.
3. Ghulam Mohd.
4. Ali Shah.
5. Mohi-ud-Din Zargar.
6. Mohi-ud-Din.

Presented by Mr. Mani.

Copy of this has been furnished to Proseeution. Prosecurion wants time for rejoinder.

This may be put up tomorrow. In the meantime Ata Ullah Beg may be kept in Judicial Lock-up, Jammu (Central Jail) as per directions already issued in this behalf regarding his custody.

Announced.
1—9—59.

Sd. N. K. HAK,
Special Magistrate.

Prosecution filed its objections today. Mr. Mani wants to file rejoinder and wants time till tomorrow.

This may, therefore, be put up for rejoinder on behalf of defence tomorrow the 3rd of June 1959.

Announced. Sd. N. K. HAK,
2-6-1959. Special Magistrate,

In the Court of Special Magistrate, Jammu.

STATE *v/s.* MIRZA MOHD. AFZAL BEG AND OTHERS.

[Presented by Mr. R. K. Kaul, P. P. Sd. N. K. Hak Special Magistrate, 2-6-1959.]

The prosecution respectfully showeth :—

1. That an application was filed by the accused on 1-6-59 and this has been brought to the notice of the prosecution, for such objection, if any, which they may have to make in the matter.

2. The prosecution begs to submit the following in this connection :—

(a) The prosecution does not admit as is alleged in para 1 of the petition that the witness Atta Ullah Beg has stated in his depositions, that he was kept under the influence of the police in Kothi Bagh jail, Srinagar. As a matter of fact, he was placed there under judicial orders and a jail is not a place where the police can have any influence.

(b) As regards the allegations in para 2 of the petitioners that the witness is likely to be tampered with by the police in the matters brought out in cross-examination, the prosecution submits that the witness's testimony is over. His deposition has been recorded on oath and if he deviates from matters which he has allegedly admitted in favour

of the accused, he can be prosecuted for purgery. There is no justification for a supposition that even inside a jail the witness will be tempered with by the police as the custody of prisoners is with the jailers and the jail staff who directly work under the orders of the Magistrate.

2. That there is no reason to suppose that the police will influence him in the jail at Kothi Bagh, Srinagar and will not do so in the Central Jail Jammu, and that where ever he is kept, if he is kept under judicial orders and in jail custody, conditions about police influance will be the same.

4. That the prosecution objects to any of these witnesses being kept at a police near the accused and the prosecution will object to any change in the arrangement which has prevailed so far. The accused are influtntial persons and they are ex-high dignitaries of the State and it would be dangerous to allow the ex-colleagues of these accused to remain within a near distance and in the same town and locality as the accused.

5. That the approvers were kept at Kothi Bagh Jail, Srinagar under judicial orders and under judicial supervision, and there is no reason why a change should be made now. One of the main reasons for detaining the approvers in custody till the trial is over is to secure their safety. Such a safety will be better for the approvers if they are in Srinagar, than if they are in Jammu, where the accused are under-going the trial. The prosecution further submits that the previous arrangement should not be disturbed.

Jammu dated the 1st June, 1959. Sd. RADHA KRISHEN KAUL, Public Prosecutor.

In the Court of Special Magistrate, Jammu.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS.

[Presented by Mr. Mani. File. Sd. N. K. Hak, S. M. 3-6-1959.]

1. The applicants deny all insinuations, imputations and allegations made against them in the said rejoinder by the

prosecution, They also refute the imputation of motives ascribed to them.

2. All such insinuations, imputations and allegations, baseless and unwarranted as they are, are calculated to coerce the petitioners to refrain them from bringing to the notice of the court and to the world at large, the illegalities and the third degree methods used by the investigating authorities, in particular by the C. I. A., police of the State, and thus to scare away the petitioners from making any legitimate request to the Court in order to safeguard their rights, at least for the future.

3. It is now abundantly clear that the so-called "approvers" have already been under the de-facto charge and direct influence of the C. I. A. Kashmir police, headed by Sh. Ghulam Qadir, S. P., who having conducted searches and arrested people and alleged to have carried out investigations in this and allegedly connected cases, is the chief prosecution witness. It will be flagrant denial of justice to the petitioners if the said "approvers" are committed back to such custody.

4. The petitioners have contended that the two so-called approvers have for years been in police custody before "appropriate confessions" were extorted from them. The petitioners are in possession of good proof of this and similiar other concoctions. All this has happened in what the prosecution calls the Kothibagh sub-jail, but actually is a mere extension of the same premises to those in which the Superintendent Sh. Ghulam Qadir of the C. I. A. has his main office and headquarters. The petitioners would in due course place before the court a complete picture of the happenings in this so-called sub-jail.

5. Though the said sub-jail is technically under the Superintendent, Central Jail, Srinagar, but his supervision and control is only formal and nominal, the real and de-facto authority control being exercised by C. I. A. police generally and Sheikh Ghulam Qadir, Superintendent C. I. A. particularly. A number of the accused in this case have been inmates

of the said sub-jail in the past and therefore have personal knowledge of that jail administration. Any premature detailed disclosure of the said administration will prejudice the petitioners' defence.

6. The present Superintendent, Central Jail, Srinagar, is completely under the influence of the police and particularly that of said Sheikh Ghulam Qadir. Some of the accused in the present case had this bitter experience during the Hazratbal murder case inquiry, when in collision with the jail staff, the indentification of the prisnors by the police witnesses was facilitated. Similar other illegal acts to help the police were often done.

7. Some of the accused in this case while under detention in Srinagar Central Jail, have often made serious complaints against the said Superintendent Jail, whose animus against the petitioners is therefore obvious.

8. Superintendent, Srinagar Central Jail's custody of the so-called approvers cannot be free from police and other influence over the latter.

9. The prosecution's keenness to send back the approvers to Kashmir, though the inquiry is being held here—200 miles away from Srinagar—further strengthens the apprehensions of the petitioners that all has not been above heard and legal heretofore. The solicitude to send the "approvers" to Kashmir is due to the desire to perpetuate the police domination on the minds of the 'approvers' as hitherto. The prosecution seems to be nervous that if the police domination is somehow released, the so-called approvers might unfold the story of torture, brain-washing, third degree methods and concoction and fabrications that the police have so far made. The Court being interested in truth, the petitioners still hope that such design of the prosecution will be foiled.

10. The petitioners are at a loss to know any cause other that indicated above, which prompts the prosecution to oppose the petitioners' request for custody of the 'approvers' in Jammu rather than in Kashmir. The inquiry is being held

in Jammu and the "approvers" presence will be necessary here. The supervision, control and custody of the 'approvers' in Jammu by the court will be direct and effective here rather than 200 miles away in Srinagar. Further the petitioners may have to request the court from time to time to pay surprise visits to the jail in order to see that the so-called 'approvers' are free from police and other influences. This can physically be possible only when the so-called approvers are lodged in Jammu rather than removed to Srinagar where the court does not personally know anything about their custody and control.

11. The prosecution's contention is not only baseless but even provocative that the petitioners will attempt tampering with the so-called approvers if lodged in Jammu, because :—

(a) The petitioners are lodged in the special jail and the so-called approvers will be put in Central Jail--quite a few miles away.

(b) The petitioners are under 24 hours' armed guard of the Central Reserve Police and while coming to court which is hardly a few yards' distance, are kept under heavy guard.

(c) The administration of the two jails is absolutely independent and separate.

In view of above, any contact between the petitioners and the approvers is inconceivable. We refute, and protest against the imputation of such intention to us. It is even under sheer compulsion of circumstances that the petitioners suggest the custody of Jammu Jail, otherwise the possibility of C. I. A. police spreading its tentacles even to the Jammu Jail cannot be ruled out.

12. The petitioners entertain grave apprehensions that one of the so-called approvers Zaman Parey's illness is a sheer pretext just for paving the way to secure transfer from Jammu Jail to Srinagar. On 1-6-59 when the petitioners presented the first application praying for retaining the so-called approvers in custody in Jammu, the said Zaman Parey was

present in the Court and appeared as witness. On 2-6-59 his examination in chief was continued and finished and just as the cross-examination had begun he intimated the fact of his so-called illness to the Court. Should the apprehension of the petitioners prove true and should the 'approvers' with the backing of the State authorities succeed in securing a medical certificate, the petitioners would pray that the fact of illness should formally be legally proved before this Court in the presence of the petitioners.

13. Furthermore the petitioners submit that the Superintendent, Central Jail, Srinagar, is going to figure as a witness in this case and it will be seriously prejudicial to the defence to hand over the so-called approvers to his custody. It would tantamount to one witness having the custody of the other.

14. The petitioners reserving their right to question the legality of the so-called approvers' custody in Srinagar Jail during the past months, revert to the prayer made in their petition dated 1-6-59, that

(a) The so-called approvers Atta Ullah Beg and Zaman Parey may be lodged in the Central Jail, Jammu till the conclusion of the trial of this case.

(b) The said so-called approvers be kept separately and aloof from others.

(c) No police officer or any authority other than the usual judicial jail staff may have access to them during the pendency and till the disposal of this case.

In the interests of justice the petitioners pray that the above request be granted as they fervently hope that such a step will assist in the disclosure of the truth.

Sd. 1. M. A. Beg.
2. Ali Shah.
3. Ghulam Mohd. Chiken.
4. Mir Ghulam Rasool.

Special Jail, Jammu :
Dated 2-6-59.

5. Pir Afzal.
6. Mir Mohd. Nazir.
7. G. K. Beg.
8. Pir Abdul Gani.
9. Sir Mohd. Maqbool Vilgami.
10. Mohi-ud-Din Shah.
11. Mohi-ud-Din Zargar.

In the Court of Special Magistrate, Jammu.

STATE *vs.* MIRZA MOHD. AFZAL BEG & OTAERS.

The Prosecution respectfully showeth :—

1. On 3-6-59, a petition was filed on behalf of the accused calling it a rejoinder, to an objection in writing filed by the prosecution to the prayer of the accused that Zaman Parey and Atta Ullah Beg, the two approvers, be kept in Jammu jail and be not sent back to Srinagar. In the guise of a rejoinder, the real purpose of the petition has been revealed in para 2 wherein there is a clear indication of bringing before the notice of the 'world' the so-call-ed grievances of the accused. The Prosecution themselves have been noticing that, in season or out of season, almost everyday, some applications are being filed on some pretext or another to serve as a material for propaganda in the world and these petitions are neither correct in facts, nor sound in law. The main purpose of these applicattons is designed to create a propaganda for world consumption that justice is not being done to them. The whole object now appears to be to stifle this trial when incriminating evidence is coming in against the accused who are charged with having committed illegal conspiratorial acts in the interest of a foreign country. In this connection, it is necessary to remember that the foreign power, several of whose officers are accused of conspiring with the accused of Kashmir for attempting to overthrow the Government of Kashmir by creating disorder,

sabotage etc. recently stated before an International Organization that the trial of Sheikh Abdullah was a 'stage-managed trial'. Petitions with false allegations are being filed which support that foreign power's allegations. Recently a pamphlet has been published in the name of one R. L. Lakhanpal publishing various petitions filed by the accused in this case. Such petitions contained various false allegations against the prosecution and the State Government and were rejected by the highest courts in the country. They could not have been published except by way of reproducing petitions containing similar false allegations filed in the court. Fresh petitions containing similar false allegations are now being filed since the 21st of May 1959 which apparently would provic materials for a fresh volume of that pamphlet, or similiar other pamphlets, obviously for propaganda.

2. That the extremely impartial and fair, if not, generous, treatment which is being given to the accused in this case will be apparent from the following facts :—

(a) In the jail special diet, special cooking arrangement, servants and cooks have been provided to suit the convenience and taste of the accused.

(b) Family allowances are being given, which are normally never given to an accused charged with such serious offences of treason against one's own country.

(c) In court they have been provided with cushioned chairs and they are free to relax while the trial is going on. They go on reading their newspapers or magazines in court while the trial is going on.

(d) A special new jail has been newly constructed with electric light and fans and they have been provided with coolers to make them comfortable in the hot season.

(e) When any of the accused falls ill and his illness is certified by the medical authority, his bail application has not been opposed and thus Mohd.

Amin, Ghulam Mohi-ud-Din Hamdani and Soofi Mohd. Akbar have been allowed bail unopposed.

There are some of the facilities which the accused have been provided with. Inspite of all this, when the prosecution is producing incriminating evidence against them, the accused are now playing the game of hampering the trial by means of such frivolous applications, containing mis-statements of facts and law, and all this is being done to serve as propaganda and to prevent evidence coming in.

3. That these approvers had filed applications for pardon and they were also examined by the Additional District Magistrate and in this court they have adhered to those statements on oath during a protracted cross-examination lasting for merely a week. Till the end of Atta Ullah Beg's deposition, during the one year that he and Zaman Parey had been in Srinagar jail, there was no application by the ascused that he should be removed from Srinagar Jail or that they were under police influence. It was only when Atta Ullah Beg did not swerve from his statement, given earlier before the Additional District Magistrate, that this application has been filed with some ulterior motive. Now that the statement of Atta Ullah Beg has finished and that of Zaman Parey's is also finished, there is no question now of their being tampered with by the Prosecution. If anybody seeks a change from that they have stated, it will not be the prosecution whose case they have fully corroborated but it will be the accused who may yet hope either to persuade or to intimidate or coerce or to remove from their path, their erstwhile colleagues in the conspiracy, namely these two approvers. So far as this court is concerned, there is no question of any tampering now. This Court can either commit the case to the Court of Sessions or discharge the accused, after the evidence has been gone through. If the accused are discharged, there will be no question of police influence being cast on these approvers. If the accused are committed to the Court of Sessions, another Court will have jurisdiction over these approvers and persons interested in these

approvers changing their statements, will not be the prosecution whose case they have supported in full, but the question of tampering can only arise on the side of the accused.

4. The object of detention of an approver is not to punish him, nor to coerce him, but merely to provide safety for him so that he may be available before the Court for evidence and so that he may be absolutely safe physically and that others may not tamper with the conditions of pardon which the approvers have accepted. There is no provision in law that the accused can dictate to the Court as to where the approvers are to be kept. The responsibility of their safety and their availability as witnesses in future proceedings lies with the Court and the Government. This petition and its prayers are absolutely irrelevant in as much as the accused may in that case, very well demand that all the witnesses may be kept in Jammu.

5. Considering that this is a case of grave importance, considering that the prosecution evidence is that a foreign country is interested in this case and is interested in causing sabotage and damage in this country, it is all the more necessary that these approvers should remain at a place where their safety can be better assured. So far the accused have not made any mention that these approvers were in any way influenced by Kashmir Police and it was only after the evidence of Atta Ullah Beg that such a petition has been filed.

6. The real purpose of the petition is to make a false propaganda before the world that the Indian Police, or the Kashmir Police adopt 'third degree methods' does 'brain washing', 'torture' and some other acts attributed to them in the so-called petition of a rejoinder and this petition is in keeping with the scheme of serving foreign interest which the accused have been adopting. The prosecution humbly denies all the statement of facts about the police, about the Court, about the prosecution and about the state, which the petition contains. No ground has been made out for adopting a different course to what was ordered by the Court one year back, and the Court cannot presume the fate of the case at this

stage. Therefore, on the pretence of possible tampering before the Court of Sessions, before which the case may or may not be committed, it is not correct to put the approvers to any risk of their life, or their helath, by keeping them near about the accused and their sympathisers here.

Sd. M. L. NANDA,
Public Prosecutor.

Dated the 8th June 1959.

Presented by Mr. R. K. Kaul, P. P.

Mr. Latif, Advocate and M/s M. A. Beg and Sheikh Mohd. Abdullah accused, object to this. Their contention is that this is a rejoinder to their rejoinder which is not admissible in law and this may be returned to prosecution.

Mr. Nageshwar Prashad submits this is in reply to the new matter that has been brought in by the accused in their rejoinder and this has been necessitated by what has been brought in the rejoinder on behalf of the accused petitioners. His submission is that as the petition, rejoinder and objections of both sides are before the Court, the Court may decide the matter on the material submitted by both sides.

Mr. Beg submits that no new matter has been brought in in their rejoinder and before this matter is decided he may be heard in the matter.

Mr. Beg assured the Court that he would make his submission very briefly.

On this assurance Mr. Beg may make his submission on the day after tomorrow when the Court meets next. In that case, prosecution can also make its submission.

This petition along with other papers may be put up the day after tomorrow i. e. Wednesday the 10th of June, 1959.

Sd. N. K. HAK,
Special Magistrate.

Announced.
8-6-1959.

In the Court of Special Magistrate Jammu.

STATE *vs* MIRZA MOHD. AFZAL BEG & OTHERS.

Place of custody of so-called approvers.

(This may be taken into consideration for the disposal of the application referred to above.)

The applicants submit as under :—

1. On 1-6-59 the applicants submitted a petition requesting the Court, amongst other things, not to return Atta Ullah Beg & Zaman Parey, the two so-called approvers, to Kothibagh sub-jail, where they have been under the influence of police, as revealed in their cross-examination. The prosecution, by their application of 2nd July 1959, opposed this prayer to which the defence filed their rejoinder on the same day, detailing pertinent reasons for the detention of the so-called approvers in Jammu Central Jail.

2. The prosecution have further filed their objections to the said prayer on 8-6-1959, contesting the defence request. The petitioners have on the very day the last application of the prosecution was filed, taken objection to this practice and they hereby reiterate that objection and pray that the application of 8-6-59, filed by the Public Prosecutor, be taken off the record.

3. The said application of the prosecution deals with matters mostly irrelevant to the issue before the court and therefore should be rejected.

4. The petitioners deny the allegations made in para 1 of the Public Prosecutor's said application that the objections taken by the defence to the custody of the so-called approvers in Srinagar are "a propaganda for world consumption". Whereas all submissions to the court in relation to the case have the sanctity of the fundamental rights behind them, it is also equally true that in an open trial the public at large have a right to know the evidence and all facts revealed in proceedings on

which conclusions are subsequently to be based. To call this "propaganda for world consumption" is sheer distortion.

The other allegations made in the said paragraph are unwarranted and it is neither fair nor right for a Public Prosecutor to assert allegations which are yet sub judice and in particular are not germane to the issue now before the court i. e. the custody of the so-called approvers. The petitioners completely deny these allegations as baseless and false.

The reference to the publication of a pamphlet by Mr. R. L. Lakhanpal is also extraneous to the issue and is irrelevant.

5. Statements made in para 2 of the said application are a typical example of gumbling, irrelevant and extraneous matters in order to confuse a simple issue. The learned Prosecutor seems to argue that since the petitioners are getting "special diet, special cooking arrangements, servants.....family allowances, cushioned chairs...electric lights and accommodation in a jail newly constructed", therefore the so-called approvers must be lodged in Srinagar. The petitioners need hardly refute such an illogical, irrelevant plea. Equally illogical in this context, is the prosecution plea that when an accussed person was medically reported to be seriously ill, the prosecution did not oppose his bail application.

Since the prosecution reply on this above mentioned, illegal and irrelevant grounds in support of their request to recommit the so-called approvers to Kothibagh sub-jail or any other jail in Kashmir, the petitioners hope and pray that the prosecution request will be outright rejected.

The other allegations made in this paragraph are also baseless and the petitioners record their denial thereto.

6. In regard to assertions made in para 3 of the learned Prosecutor's said application, the petitioners deny the same. As regard to the grounds of the petitioners' request, reference is most respectfully invited to the petitioners' previous application which details out such grounds. All the imputations and accusations levelled in this paragraph are also denied as baseless.

The petitioners repeat that the so-called approvers have been under the dominating influence of the police all along and that there is good material on the file corroborating the same.

The rest of the assertions in the said para are not relevant to the issue.

7. The accused do not admit the inference and the allegations made in para 4 of the said application. Custody must be judicial custody and in all cases free from police influence. The Prosecution have made no case of insecurity in Jammu for the approvers nor any lack of safety for them in the Jammu Central Jail. Their request therefore for the retransfer of the said approvers to Srinagar is frivolous. There is no question of "dictation to the Court" by the accused in the matter. Such an allegation is baseless and perhaps calculated to create unwarranted bias against the accused who have only made submission to the court about apprehensions they genuinely hold.

8. The petitioners deny the assertions made in paragraph 5 of the said petition. There is no question of the so-called approvers being kept "near the accused". The petitioners have in their previous applications fully refuted the allegation of tampering, have in details set out the reasons for custody in the Central Jail and they hereby reaffirm the same.

9. The petitioners refute the allegation of "false propaganda before the world" made in para 6 of the said application. The petitioners have stated facts with the sole objects of getting justice and fair play in this case. The Prosecution's strenuous efforts to take the so-called approvers back to Srinagar, without giving any valid reasons therefor, further strengthens the apprehensions of the petitioners that all has not been and is not above board.

10. The petitioners hope that have persual of the prosecution application of 8-9-1959, as well as of this petition will convince the court about the prosecution tactics of dragging in irrelevant and extraneous matters to cloud the

issue of levelling all possible abuses and baseless charges against the accused, in season and out of season, and giving grave provocation to the accused. Thus the prosecution have continuously indulged in maligning the accused who are doubtless innocent in the eye of law. All this is done to further vitiate the atmosphere against the accused who earnestly seek once again the protection of the court against this.

The accused further reserve this right to question the legality of 'approvers' custody heretofore and reiterating their prayer in the original application, submit that :—

(a) The learned Public Prosecutor's applications of 2-6-59 and in particular that of 8th June 1959, be rejected and taken off the record.

(b) The so-called approvers, Utta Ullah Beg and Zaman Parey be kept in Jammu Central Jail, strictly under judicial custody free from all influences and the

(c) Prosecution be directed to desist and refrain from abusing and maligning the accused.

1. G. K. Beg.
2. Pir Mohd. Maqbool.
3. Ghulam Mohd. Chikken.
4. Mohi-ud-Din Shah.
5. M. A. Beg.
6. Ali Shah.
7. Mohi-ud-Din.
8. Mir Mohd. Nazir.
9. Pir Abdul Gani.
10. Mir Ghulam Rasool.
11. Pir Afzal.

Special Jail, Jammu;
10th June 1959.

This may be considered further argument based on facts in reputation of the contention of the Prosecution.

Sd. 1. Mohi-ud-Din Shah.
2. Ghulam Mohd. Chikken
3. Pir Afzal Beg.
4. Mir Mohd. Nazir.

In the Court of N. K. Hak, M. A., LL. B., Special Magistrate, Magistrate 1st Class, J & K, Jammu.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS.

Under section 121–A, R. P. C. etc.

Re: Place of custody of approvers.

ORDER.

Atta Ullah Beg approver came to the witness-box on 21-5-59. The moment he entered the witness-box the accused filed petition to the effect that statements of Atta Ullah Beg and Zaman Parey approvers be removed from the record and they be relegated as accused persons. After arguments on both sides that petition was disposed of on 23-5-1959 on which day after the disposal of stay petition his statement commenced.

Atta Ullah Beg was examined thereafter from 23-5-1959 to 1-6-1959 on which day his statement concluded and that of another approver Zaman Parey started.

The record discloses that cross-examination of Atta Ullah Beg lasted from 25-5-1959 to 1-6-1959 and Zaman Parey was examined from 1-6-1959 up to 6-6-1959 and remained under cross-examination from 2-6-1959 to 6-6-1959.

On the conclusion of the statement of Atta Ullah Beg Mr. Mani moved this pe tition on behalf of accused petitioners on 1-6-1959.

It is stated in this petition that the witness is liable to be tampered by the police as regards his statement in cross-examination if he is sent back to Kothi Bagh sub-jail and as generally apprehended by the accused petitioners. That in the interests of justice the witness should not be sent back to Kothi Bagh sub-jail or Srinagar. It has been prayed that Court may direct Atta Ullah Beg shall be escorted by Jammu Police and lodged in Central Jail, Jammu; he shall be kept separate from others; no police officer or other authority shall have any access to him at any time during the pendency and the final disposal

of the case; and he shall not be removed to any place other than Central Jail without notice to the accused and without the permission of this Hon'ble Court. This petition is on behalf of Mr. M. A. Beg and 5 other accused persons.

It may be stated here that from the very beginning at the request of the accused Atta Ullah Beg was ordered to be kept in judicial lock-up (Central Jail) Jammu and it was directed that he should be kept separate and no police or any agency be allowed to contact him and he should be sent to the Court under escort other than the Kashmir Police. These directions still continue and similar directions have been given at the request of accused regarding Zaman Parey approver also who too continues to be lodged in judicial lock-up (Central Jail) Jammu under similar conditions.

Prosecution filed its objections to this petition on 2-6-1959 in which it has stated that as a matter of fact Atta Ullah Beg was placed in Kothi Bagh sub-jail under judicial orders and jail is not a place where the police can have any influence.

Regarding allegations that witness is likely to be tampered with by the police in the matters brought out in cross-examination prosecution has stated that the testimony of the witness is over. His deposition has been recorded on oath and if he deviates from matters which he has allegedly admitted in favour of the accused, he can be prosecuted for perjury. There is no justification for a supposition that even inside a jail the witness will be tampered with by the police as the custody of prisoners is with the jailers and jail staff directly work under the orders of the Magistrate.

There is no reason to suppose that the police will influence him in the sub-jail at Kothi Bagh and that wherever he is kept, if he is kept under judicial order and in jail custody, conditions about police influence will be same.

Prosecution has objected to the witness being kept at a place near the accused stating that accused being influential persons and ex-high dignatories of the State it is dangerous to allow the ex-colleagues of these accused to remain in the near

distance and in the same town and locality as the accused.

Objections also refer to the safeguard of the approvers and it is stated therein that such a safety will be better for the approvers if they are in Srinagar than in Jammu where the accused are undergoing trial. Prosecution submits that previous arrangements should not be disturbed.

The accused filed rejoinder to these objections on 3-6-59 refuting imputations of the alleged motives ascribed to them. It is stated in the rejoinder that the approvers have been under de facto charge and direct influence of C. I. A. police and it would be flagrant denial of justice to them if they are committed back to their custody.

Rejoinder further states that Kothi Bagh sub-jail is a mere extension of the same premises in which Superintendent C. I. A. has his main office and headquarters.

Though the sub-jail is technically under Superintendent, Central Jail, Srinagar, his supervision and control is only formal and nominal and real and de facto authority and control being exercised by C. I. A. police.

The present Superintendent Jail is under the influence of the police. Some of the accused in this case who were under detention in Central Jail, Srinagar, have made complaints against Superintendent whose animus against the petitioner is obvious.

Superintendent, Central Jail, Srinagar's custody of the approvers cannot be free from police and other influence over them.

There is a reference to torture, brain washing, third degree methods, concoctions and fabrications in the rejoinder. It is also stated therein that in Jammu supervision and control and custody of the Court will be direct and effective than 200 miles away in Srinagar.

The contention of prosecution of their attempt to tamper with the approvers has been stated as baseless.

Prosecution filed its reply to the rejoinder on 8-6-1959 which has been objected to on behalf of defence.

The contention of the prosecution is that it has been filed in reply to the new matter that has been brought in by the accused in their rejoinder and has been necessitated on that account. Prosecution has in this denied the allegations of the accused in their rejoinder stating that this has merely been done with the purpose of bringing to the notice of the world the so-called grievances of the accused. It has also referred to a pamphlet published in the name of one Lakhan Paul publishing various petitions filed by the accused in this case although such petitions contain various false allegations against the prosecution and State Government and were rejected by the highest courts in the country. It also refers to extremely impartial and fair treatment which is being given to accused in this case together with the facilities provided to them and has stated facts in snpport of this contention. It has stated that till the end of Atta Ullah Beg's deposition, during the one year he and Zaman Parey have been in Srinagar Jail there was no application by the accused that they should be removed from Srinagar Jail and that they were under police influence. Now that the statements of Atta Ullah Beg and Zaman Parey have finished there is no question of their being tampered with by the prosecution. They have fully corroborated the case of prosecution so far as this Court is concerned there is no question of any tampering now.

It has been stated in this that object of detention of an approver is not to punish him, to coerce him but merely to provide safety for him so that he may be available before the court for evidence and may be absolutely safe physically and that others may not tamper the condition of pardon which the approvers have accepted. There is no provision of law that the accused can direct the court as to where approvers are to be kept. The responsibility of their safety and their availability as witnesses in future proceedings lies with the court and the Government. This petition and its prayers are absolutely irrelevant.

Reference has also been made to grave importance of the case and purpose of making false propaganda before the world. It has also stated that for reasons stated therein the Court cannot presume the fate of the case at this stage and, therefore, on the pretence of possible tampering before the Court of Sessions before which the case may or may not be committed it is not correct to put the approvers to any risk of their life, or their health, by keeping them near about the accused and their sympathisers here.

This matter was argued by both sides. During arguments Mr. Beg filed reply to the application of Prosecution dated 8-6-1959 for consideration as further arguments in refutation to the contention of the Prosecution.

The substance of this so-called argument is that there is distortion in the application of Prosecution and that allegations asserted were not germane to the issue before the court and publication of a pamphlet by Lakhan Paul is also extraneous to the issue and is irrelevant.

Allegation of tampering has also been refuted.

M/s Beg, Sheikh Mohd. Abdullah and Latif argued this petition on behalf of defence.

The contention of M/S Beg and Latif is that approver does not cease to be an accused and continues to be so until discharge and that he must be detained in judicial custody like accused persons free from any police influence. Mr. Beg has argued that although *de jure* custody of approvers will be of Superintendent Jail, *de facto* will be that of the police C.I.A. Whatever they have gained in cross-examination will be washed off in case approvers continue to remain under police custody. No safety and safeguard of the approvers was involved in the matter and how could they have confidence 200 miles away in case they are moved to Srinagar. His argument is that it will be in their interests if the approvers are kept at Jammu and not sent to Srinagar.

Mr. Latif argued that approvers being accused they should have been produced in the Court on the first day and

also produced for remand after every 15 days being accused persons and that defence has a suspicion that they may be tampered with there and witnesses may see and contact them.

Sheikh Mohd. Abdullah stated that it is essential that approvers remain free from influence so that they are in a position to consider calmly over their evidence and reveal and stick to truth.

Shri Nageshwar Prashad has argued that the facts mentioned in their objections and application have been necessitated by what has been stated by the accused in their rejoinder. If those matters were not referred to in the rejoinder Prosecution would not have done so in reply. It will not be correct to decide the case on questions of fact at this stage, that will amount to passing judgment before evidence. His contention is that an approver is a witnesss and he ceases to be an accused and that by his being an approver he cannot be placed in a worse position than the accused persons. Approvers have been in judicial custody in Sub-Jail Kothi Bagh for a year and no petition has so far been filed by the accused petitioners regarding any influence of police over there. This petition was filed for the first time on the conclusion of the statement of Atta Ullah Beg. Interference in the arrangement will require very cogent reason and in case court makes any direction in this behalf, prosecution cannot object. There is a medical report about Atta Ullah Beg that his condition demands removal to a cold place.

Prosecution read out the following observation of Hon'ble High Court in its order dated 27-8-1958 (Transfer Petition No. 56 of 1958) at page 13 last para :—

"The best circumstances relied upon by Mr. Mani was that although the approvers were granted pardon by the Magistrate they were not produced by the prosecution on subsequent dates. This argument in my opinion is based on a very serious misconception. Once a pardon is granted to an accused and he is allowed to appear as a witness in the case it is not obligatory for the prosecution to produce him on every

date and it is obvious that he would be produced only on such dates on which his evidence is required to be taken. The argument of Mr. Mani on this point must, therefore, be overruled.

Their Lordships have been pleased to overrule the contention of Mr. Mani that approvers should have been produced by prosecution on subsequent dates after the grant of pardon. It will be observed from this that Their Lordships were of opinion that this argument is based on a very serious misconception and once a pardon is granted to an accused and he is allowed to appear as a witness it is not obligatory for the prosecution to produce him on every date and he has to be produced only on such dates when his evidence is required to be taken.

This observation of Their Lordships completely takes of the contention of Mr. Latif that approvers should have been produced in the court on the first day and also on the subsequent dates as accused persons. His contention that they should be produced after every 15 days for remand during inquiry is also based on a misconception and is not at all tenable.

Mr. Beg has referred to A. I. R 1931 Lah. 355 in which it has been held:-

"Approver like accused persons must be detained in judicial custody....."He has in particular referred to the observations on page 356 last para col. 1 and lst para col. 2.

It is an accepted principle of law that there is no difference as regards the nature of the custody in which approver is detained between approver and an accused person.

In this case it is not denied that the custody of these approvers to be judicial custody and so are the accused persons in the case also in the judicial custody.

There being no dispute as to the nature of custody the only point before us is the place of custody of the appovers.

It is for the court to order the place of custody and in such a matter no question af dictation from any quarter can possibly arise.

In this case the contention of the accused is that for reasons stated above and in their petition and rejoinder approvers may be kept in Central Jail, Jammn, and not sent back to sub-jail Kothi Bagh.

Prosecution has given its reasons for not disturbing the arrangement.

I have considered the matter very carefully. In case as is alleged by the defence the approvers were under alleged police influence at sub-jail Kothi Bagh then it is not possible to understand as to why such an allegation was not made in the Court for the last one year the approvers have been lodged there and why was no such allegation brought forth in the Court even uptil the deposition of Atta Ullah Beg concluded which lasted as already stated from 23-5--59 to 1-6-59. These persons have been tendered pardon by Additional District Magistrate, Srinagar, and their depositions have been recorded in this Court. Therefore, no question of tampering can possibly arise so far as these approvers are concerned. We are at present at a stage in which it cannot be said as to whether the case will be committed or not, because the evidence in the case has not yet concluded and is going on. To give any decision at present on any question of fact will certainly not be correct. That would amount to deciding the matter without evidence and also giving judgment before evidence.

At present Jammu is experiencing intense heat and it is the hottest part of the season. For obvious reasons, as per order of the Court dated 27-5-59, the submission of Sheikh Mohd. Abdullah that approvers may be lodged with them in the same sub-jail has not been possible to accept.

The facilities that have been provided in the Special Jail where accused persons are lodged are not at all possible and available in Central Jail, Jammu.

Therefore, to lodge approvers in this intense heat in

Central Jail Jammu lock-up without any such facilities would tantamount to place approvers in very unfavourable position than those of the accused persons.

Approvers are admittedly Kashmiris not accustomed to intense heat. To place them in this heat at a place with no corresponding facilities will really be a great hardship to them.

One of the approvers Atta Ullah Beg has been recommended by Jail Doctor to be transferred to some cold place and his report is that his health can be improved by such a change.

It appears from the statement of Zaman Parey that his statement could not be continued because of his state of health on 2-6-1959. From his statement it appears that as stated by him he being a patient of chest ailment and has also been under treatment in Srinagar.

In these circumstances, it will not be safe in the interests of health also, to subject these approvers to this heat and uncongenial atmosphere at Jammu.

In the Code of Criminal Procedure by B, B Mitra 1954 edition, page 1334, para 1, there is a reference to a case reported as 35 Cr. L. J. 111 and it has been stated therein :—

> "Once the approver has accepted a tender of pardon he stands on the same footing as any other witness with the exception that he is liable to forfeit his tender of pardon if he does not comply with the conditions on which the tender was made. . . ."

Under head 'Approver' as witness (954) on the same page Mitra has referred to 16 Cr. L. J. 632 and 32 Cr. L. J. 1913, and has observed :—

> ". . . . When an accused person is tendered pardon and he accepts it, he ceases to be an accused person, and he can be examined as a witness. . . . An accused person to whom a pardon is tendered under this section ceases to be an accused from the moment the pardon

is accepted and is to be treated as a witness thereafter. Faqir Singh, 37 Cr. L. J. 515 (517) following Khairati Ram, 32 Cr. L. J. 913."

From this commentary of the learned author based on observations of the cases referred to it would appear that once an approver has accepted tender of pardon he stands on the same footing as any other witness with the exception that he is liable to forfeit his tender of pardon if he does not comply with conditions on which the tender was made. It is also clear when an accused person is tendered pardon and he accepts it he ceases to be an accused and can be examined as a witness and that he ceases to be an accused the moment pardon is tendered and he is to be treated as witness there after.

In the face of this it is not possible to accept the contention of Mr. Beg and Mr. Latif that the approver continues to be an accused after pardon and also after he has tendered his evidence as a witness.

The only difference being that the approver has got to continue in the judicial custody till his discharge and there is no difference as regards the nature of custody in which he is to be detained between him and the accused person.

It may be observed here that even in a simple matter of the place of custody of approvers so many extraneous matters have been brought in. It should certainly be in the interests of any party as well as the case itself if petitions are confined to relevant matters alone and all extraneous matters are avoided.

Ordinarily a petition should follow with the objections, if any, by the other side and that should be sufficient to determine the matter brought in.

In this case after objections of the prosecution, to the petition, came in a lengthy rejoinder on behalf of accused petitioners followed by reply of the prosecution necessitated as asserted by senior counsel for prosecution by the matters brought in by the defence in their rejoinder.

As if this was not enough at the time of argument what is

supposed to be further arguments in refutation of contention of prosecution was filed by Mr. Beg and that appears to be nothing else but a petition in refutation of the reply of Prosecution.

A court of law has nothing to do with anything extraneous to the enquiry and the proceedings in hand. Therefore anything that is beyond the scope of these is not at all relevant for purposes of the enquiry and cannot be taken into consideration.

If the method is adopted in this of petition, replies and counter-replies is resorted to then such a course will lead us to a never ending process with no prospect of any decision.

By bringing in extraneous and irrelevant matters complications arise and confusion creeps in. It is therefore essential that petition should always conform to the point in issue and no extraneous matters should be brought in.

Allegations of whatever nature made remain as allegations only unless these are substantiated by evidence or proof.

As already stated the statements of Atta Ullah Beg and Zaman Parey have finished. Under these circumstances no question of their being tampered with by prosecution can possibly arise now.

In case the case is committed and they fulfil the conditions of pardon even at the trial they will secure their discharge. In case they do not, the pardon will stand revoked and the legal consequences shall follow.

If they deviate from matters which they have allegedly admitted in favour of the accused they can be prosecuted for perjury. So far as this Court is concerned there can possibly be no question of tampering now.

All the aspects of the matter have been discussed in detail above. The discretion of the place of custody of the approvers rests primarily with the court. In the exercise of that discre-

tion the circumstances contained in the case, nature of the case and other factors detailed above together with the health, convenience and safety of the approvers are to be taken into consideration.

For reasons stated above it does not appear just and fair to make approvers subject to intense heat at Jammu with no corresponding amenities and facilities in Central Jail, Jammu and therefore their removal to a cold place seems desirable.

They have so far been in Sub-jail Kothi Bagh for a year and during this period no such petition stating such "allegations" has been made by the accused persons right upto the moment when the statement of Atta Ullah Beg concluded on 1-6-1959 after having remained in the witness-box from 21-5-1959 to 1-6-1959.

I have given my earnest consideration to the matter and have found myself unable to accept the prayer of the accused petitioners to keep approvers in custody in Central Jail Jammu.

It is therefore ordered that approvers Atta Ullah Beg and Zaman Parey be removed to their previous place of custody i. e., Sub-Jail Kothi Bagh and kept there in judicial lock-up till they are wanted by the court.

In order to ensure that they remain there without any influence it is directed that they may be kept separate in that Sub-Jail and no police officer or any agency be permited to contact them excepting in the interests of their health by way of treatment and medical examination without permission from the Court. Officer incharge of that Sub-Jail will submit fortnightly report to the Court regarding strict observance of these directions.

The prayer of the accused petitioners to keep approvers in custody in Central Jail, Jammu, cannot for reasons stated above be accepted, and that prayer is therefore rejected.

Sd. N. K. Hak,
Special Magistrate.

15-6-1959.

CHAPTER VIII.

نقل درخواست غلام محمد حکین ملزم مشمولہ مثل عدالت مسٹر این۔ کے ہاک سپیشل مجسٹریٹ مجسٹریٹ درجہ اوّل جموں و کشمیر

بخدمت سپیشل مجسٹریٹ صاحب (بمقام کُد)

جنابعالی۔ گذارش خدمت یہ ہے کہ چند روز اپنے زرعی زمین موضع ٹھنڈمہ تحصیل بارہمولہ میں گذار کے بعد مورخہ ۲۵ فروری ۵۹ء ۱½ بجے دن اپنے گھر واقعہ کرن نگر سرینگر واپس آ رہا تھا۔ کہ مکان اور احاطہ کو مسلح پولیس کے گھیرے میں پایا جنکی تعداد تقریباً ساٹھ ستر کے قریب تھی۔ دریافت کرنے پر معلوم ہُوا۔ کہ میرے مکان کی تلاشی لی جا رہی ہے۔ اندر جاکر معصوم بچوں کو خوفزدہ اور کانپتے ہوئے پایا۔ میری بیوی کو جو کہ پردہ کی سخت پابند ہے۔ پولیس تلاش کے لئے کمرے کمرے چابیاں لیکر پھر رہی تھی۔ مکان کے اندر غلام حسن شاہ سب انسپکٹر پولیس وردی پوش تھا۔ اور اس کے ساتھ ایک کشمیری پنڈت مفتی میں تلاشی لینے اور ہدایات دینے میں مصروف تھا۔ اس شخص کے متعلق بعد میں دریافت ہُوا۔ کہ پنڈت بنسی لال ہیڈ کانسٹیبل ۴۲۵ سپیشل پولیس کا ہے۔ ان کے علاوہ چار پانچ وردی پوش سپاہی اور ایک شخص مسمی خلیل کاچرو بدموزن ساکن سرائے بالا تلاشی میں مصروف تھے۔ یہ شخص ایک بدنام جواری ہے۔ اور میرے گھر سے ڈیڑھ میل دور رہتا ہے۔ میرے مکان کے ساتھ جو آدمی مثلاً پنڈت ٹھاکر رام فوطیدار سابق ڈائریکٹر محکمہ زراعت۔ پیرزادہ غلام احمد چیف سیکریٹری گورنمنٹ جموں و کشمیر۔ پنڈت سروانند سنبھلی رئیس۔ خواجہ غلام محمد

دوسرے روز پنڈت تریلوکی ناتھ مٹو ایڈیشنل ڈسٹرکٹ میجسٹریٹ تھانے پر تشریف لائے۔ ہم کو ان کے روبرو پیش کیا گیا۔ اور ان سے معلوم ہوا کہ میری گرفتاری مبینہ حضرت بل قتل کیس میں عمل میں لائی گئی ہے۔ اور اس کے ساتھ آتشزنی مسجد وغیرہ تعزیرات کے بے شمار دفعات عائد کئے گئے۔ میجسٹریٹ کے پاس ہم نے کمرہ کی ناقابلِ برداشت حالت۔ غسل خانہ اور جائے ضروری کی عدم موجودگی کے متعلق واویلا کیا۔ ساتھ ہی یہ بھی عرض کیا کہ موازی پانچ آنہ جو ہماری ایک وقت روٹی کے لئے گئے ہیں قوت لایموت کے لئے کافی نہیں ہیں۔ ایسی جانکاہ سردی میں بستر سے یا انگیٹھی کا کوئی انتظام نہیں ہے۔ مگر کوئی انسداد نہیں ہوا۔ میجسٹریٹ صاحب مجھے ایک ہفتہ کا ریمانڈ دیکر چلے گئے۔

چھٹے روز ڈاکٹر محمد اشرف صاحب نقشبندی سول سرجن تشریف لائے اور ہمارے کمرہ حوالات کو دیکھ کر [illegible] فوراً دینے اور دیگر ضروری انتظامات کرنے کی تحریری ہدایات کر دی۔ میری بیماری کا خاص طور ذکر کیا اور دوائی کے لئے نسخہ دے کر اس کی فوری فراہمی کا حکم دیا۔ مگر نہ تو دوائی آئی اور نہ حالات میں کوئی تبدیلی کی گئی۔ یہاں تک کہ کمرے کی صفائی تک نہیں کرائی گئی۔ ابتدائی ریمانڈ ختم ہونے کے بعد پنڈت کالشی ناتھ فسٹ ایڈیشنل منصف سرینگر تھانہ میں تشریف لائے۔ اور مزید ایک ہفتہ کا ریمانڈ دے کر چلے گئے۔

۱۴ مارچ ۱۹۶۸ء بوقت شام مجھے بتایا گیا کہ ڈاکٹر صاحب کی ہدایت کے مطابق مجھے جوڈیشل حوالات میں لیجانا ضروری ہے۔ جہاں صفائی دوائی وغیرہ ہر چیز کا بندوبست کیا گیا ہے۔ مگر بجائے جوڈیشل حوالات تھانہ خانیار سے بوقت شام پنڈت [illegible] کالشی سب انسپکٹر پولیس نے مجھے حراست

ایجوکیشن سیکریٹری اور خواجہ غلام محی الدین پیر سیکریٹری انڈسٹریز ڈیپارٹمنٹ وغیرہ رہتے ہیں۔ ان میں سے کسی بھی ایک شریف آدمی کو مصلحتاً نہیں بلایا گیا تھا تاکہ تلاشی کے دوران درندگی۔ رذالت اور من مانی کارروائی کرنے کے لئے کسی قسم کا حجاب نہ رہے۔ چنانچہ میرے آنے سے قبل بھی کمینہ پن کا کافی مظاہرہ کیا گیا تھا جس کا مجھے اس نقشہ سے اندازہ ہو گیا جو اس وقت میرے گھر کا بنا ہوا تھا۔ ہر کمرے کے دروازے کھلے پڑے تھے۔ اندر کھلی صندوقچیاں اور الماریاں خالی پڑی تھیں۔ تمام کپڑے اور اثاثہ البیت کمروں میں اس طرح بکھرے پڑے تھے۔ کہ گویا کسی خاص جلدی میں ڈاکو مکان کو لوٹ کر چلے گئے ہیں۔ یہ تلاشی دانستہ میری غیر حاضری میں اس لئے کی گئی تھی کہ میری مستورات اور معصوم بچوں کو دہشت زدہ کیا جائے۔ ورنہ کمار خاص پہرہ جو آدمی بحیثیت جس جس مکان کی نگرانی کے لئے تعینات رہتے تھے۔ ان کے ذریعہ پولیس اچھی طرح جانتی تھی کہ میں کئی روز سے گھر سے باہر چلا گیا ہوں۔

خانہ تلاشی ایک بجے روز سے چھ بجے شام تک جاری رہی اور کوئی قابلِ اعتراض چیز برآمد نہیں ہوئی۔ اس کے بعد مجھے گرفتار کیا گیا۔ اور مجھے یہ دریافت کرنے کی مہلت بھی نہیں دی گئی کہ میرے گھر سے کوئی چیز تلاشی کنندگان اور ان کے ساتھی اٹھا کر تو نہیں لے گئے۔ وارنٹ گرفتاری کا مطالبہ کرنے پر بتایا گیا کہ یہ گرفتاری و خانہ تلاشی کرنے کے لئے پولیس کو کسی وارنٹ کی ضرورت نہیں ہے۔ گرفتار کر کے مجھے تھانہ شیر گڑھی میں پہنچایا گیا۔ دس بیس منٹ حوالات میں رکھنے کے بعد پھر نکال کر تھانہ خانیار میں پہنچایا گیا۔ یہاں حوالات کے ایک ایسے کمرے میں ڈالدیا گیا۔ جو کہ نہایت سرد۔ نمدار اور تاریک تھا۔ اس کے اندر اور بھی گرفتار شدہ آدمی تھے۔ اور کمرہ نہایت تنگ تھا۔

آپ نے مجھے حسب ذیل الزامات دیئے :۔

۱۔ یہ کہ میں پاکستان کے ایجنٹ کی حیثیت سے کشمیر میں تخریبی کاروائی کر رہا ہوں

۲۔ یہ کہ میں اس غرض کی تکمیل کے لئے جنوری ۵۸ء میں پاکستان جا کر پرائم منسٹر پاکستان۔ گورنر مغربی پاکستان مسٹر مشتاق احمد صاحب گورمانی۔ میجر دین محمد ڈائریکٹر متعلقہ کشمیر۔ ڈاکٹر خالصا صاحب و دیگر پاکستانی ملٹری و پولیس انٹیلی جنس افسران سے اس غرض کی تکمیل کے لئے ملا ہوں۔

۳۔ یہ کہ میں پاکستان سے اسلحہ بارود اور بم وغیرہ درآمد کر کے تخریبی کاروائی چلا رہا ہوں۔

۴۔ یہ کہ میں پاکستان سے بھاری رقوم درآمد کر کے حکومت ہند اور حکومت کشمیر کے خلاف تحریک چلا رہا ہوں (۵) یہ کہ میں لٹھو نائیر ریڈیو سٹیشنل مشین پاکستان سے ناجائز طور درآمد کر کے حکومت ہند۔ حکومت کشمیر اور الحاق کشمیر کے خلاف پراپیگنڈہ چلا رہا ہوں۔

میں نے ان بے بنیاد الزامات کی تردید کرتے ہوئے جواب میں عرض کیا کہ ۹ راگست ۵۳ء سے متواتر اڑھائی سال قید میں رہنے سے میری دل کی بیماری میں بہت اضافہ ہو گیا تھا۔ جس کے علاج کیلئے مجھے پیرول پر جیل سے رہا کیا گیا تھا۔ اور جس کے علاج کے لئے میں ماہ جنوری ۵۸ء امرتسر چلا گیا تھا۔ اور وہاں کے مشہور سپیشلسٹ سے ۲۵ روپیہ فیس دیکر معائنہ کرایا تھا۔ ان دنوں لاہور میں کرکٹ کا میچ ہونے کا بڑا چرچا تھا۔ جس کو دیکھنے کے لئے ہزاروں ہندوستانی جن میں سینکڑوں کشمیری بھی تھے لاہور جا رہے تھے۔ امرتسر میں مجھے معلوم ہوا کہ لاہور میں دل کی بیماریوں کا ایک مشہور سپیشلسٹ ڈاکٹر یوسف نامی ہیں۔ چونکہ میں بھی کھیلوں کا شوق رکھتا ہوں۔ اس لئے دیکھا دیکھی کچھ شوق کھیل کے شوق سے اور کچھ علاج معالجہ کرانے کی غرض سے اچانک لاہور

میں بذریعہ ٹیکسی سوسنہ وار سنٹرل انٹروگیشن سنٹر میں پہنچایا۔

یہ جگہ ایک ایسے مقام پر ہے جہاں برسات میں Waterlogging ہو جاتی ہے۔ یہاں کوئی ڈاکٹر کل بھوشن صاحب سابقہ ہیلتھ آفیسر سرینگر کو سنٹرل انٹروگیشن سنٹر بنایا گیا ہے۔ اور اس کے اصطبل اور گیراج کو حوالات میں تبدیل کیا گیا ہے۔ لہٰذا اوقات ان کمروں کے اندر بھی پانی جمع ہو جاتا ہے۔ چارپائی تو درکنار کمرے میں بچھانے کی بھی جگہ نہیں۔ اور نہ کوئی بستر ہے۔ کمرہ ۱۰×۱۰ فٹ سے زیادہ نہیں۔ ایک کھڑکی اور ایک دروازہ ہے۔ جس پر آہنی سلاخیں لگی ہیں۔ اندر سے ایک چوبی دروازہ بھی ہے۔ جس کو بند کرنے کے بعد دن کی روشنی کا کوئی پتہ نہیں چلتا ہے۔ اور اس مرکز کا نام اگرچہ ایڈیشنل پولیس لاک اپ کوٹھی باغ رکھا گیا ہے۔ مگر گارڈ اور دیگر سب انتظام سنٹرل ریزرو پولیس کے ہاتھ میں ہے۔ برائے نام ایک ریاستی کانسٹیبل رجسٹر اتی کی خانہ پوری کے لئے رکھا گیا ہے۔ باقی دو دیگر رفع حاجت وغیرہ کے لئے اس جگہ پر کوئی انتظام نہیں ہے۔ صرف کمرے کے اندر ایک کھلا برتن رکھ چھوڑا ہے۔ تاکہ رفع حاجت وغیرہ کے لئے استعمال کیا جائے۔ دیواروں پر اس قدر تھوک چڑھی ہوئی ہے کہ پلستر گر گر کر چاروں طرف جمع ہو گیا ہے۔ پھٹتی سردی میں بھی کوئی کانگڑی نہیں دی گئی۔ اور نہ اس شام کوئی چیز کھانے کے لئے دی گئی۔ صبح ۸ بجے مجھے پہرہ والے سنتری نے بتایا کہ تیار ہو جاؤ۔ صاحب کے سامنے پیش ہونا ہے۔ اس وقت چھ سات سپاہیوں کی ہتھکڑی ڈال کر مجھے حوالات سے نکال کر ساتھ والی کوٹھی میں ایک بلند قد کی آنکھوں والے شخص کے سامنے پیش کیا گیا۔ ہتھکڑی پہنانے کا یہ سلسلہ برابر ۲ مارچ ۵۸ء سے ۳ مئی ۵۸ء تک جاری رہا۔ اس روز بعد میں مجھے معلوم ہوا کہ سردار صاحب کا نام سردار وجیت سنگھ ہے۔ اور آپ سنٹرل انٹیلی جنس کے ایک افسر ہیں اور شاید ڈی۔ ایس۔ پی کے عہدہ دار ہیں۔

ہو جاویگا کہ تم واقعی تمام ضد اور [illegible] چھوڑ کر ہماری کہانی کی حرف بحرف تائید کرنے اور اپنے دیگر شریک جرم دوستوں محمد افضل بیگ اور شیخ محمد عبداللہ وغیرہ کی ساری قلعی کھول دینے پر آمادہ ہو گئے ہو۔ یہ سلسلہ صبح ۸ بجے سے شام ۸ بجے تک جاری رہا اور ہر ایک لمحہ کے ساتھ مجھے گالیاں اور دھمکیاں دیجاتی رہیں۔ شام کو پھر اسی حوالات کی کوٹھڑی میں پہنچایا گیا۔ جس کا اوپر ذکر کیا گیا ہے۔ حوالات کی کوٹھڑی کے اندر اگر کسی وقت میری آنکھ لگ جاتی تھی تو پہرہ والا مسلح سپاہی فوراً جگا دیتا تھا۔ جو کہ تیز بجلی والی روشنی میں میری ہر حرکت کو جھانک رہا تھا۔ اگر میں اس کے بلانے پر جواب نہ دیتا تو سلاخوں میں سے بندوق کی نالی داخل کر کے سنگین سے مجھے جگا دیتا تھا۔ یہ سلسلہ ہفتہ بھر جاری رہا اور دوسرے دن صبح سے ہی مار کٹائی کی کارروائی شروع کر دیگئی۔ جب مکّوں اور جوتوں کے ٹھڈوں سے میرے جسم کے [illegible] حصّے کو اس حد تک داغدار کیا جاتا تھا کہ ان کے خیال میں مزید پیٹنے سے درد کا احساس نہیں ہوتا تھا۔ تو مجھے جلیبیاں جو کہ وہ ان دنوں اپنی نجاریوں میں بالن کیلئے استعمال کر رہے تھے کے ساتھ کوٹنا شروع کر دیا جاتا تھا۔ ناچار میں کہتا تھا کہ خدا کے لئے مجھے گولی مار کر ختم کرو۔ اس پر کہا جاتا تھا کہ ہماری کہانی کی لفظ بہ لفظ تائید کرو۔ تب تمہاری خلاصی ہو سکتی ہے۔ کئی راتیں تشدد جاری رکھنے کے لئے مجھے سامنے والی کوٹھی میں بھی یہ افسر اپنے سامنے ساری رات رکھتے۔ یعنی روز تشدد جاری رکھتے تھے۔ اور ہرگز ایک لمحہ بھی سونے نہیں دیتے تھے۔ اس کے لئے وہ خود دو گھنٹے کی ڈیوٹی بدلتے رہتے تھے۔ جب چیختے چلاتے میرا گلا خشک ہو

جانے کا خیال ہوا۔ اور اس موقع کو جبکہ عام اجازت مل رہی تھی غنیمت سمجھ کر [illegible] کے لئے فارم وغیرہ پُر کر دیئے۔ اور اجازت حاصل کر کے لاہور چلا گیا۔ اس موقعہ پر بچا کھچا ساٹھ ہزار کے درمیان ہندوستانی مزید چلے گئے۔ مجھے لاہور جانے کے لئے یہ بھی خیال رہا کہ بچھڑے ہوئے رشتہ داروں سے ملاقات [illegible] میں قیام لاہور کے دوران دہلی مسلم ہوٹل انارکلی میں ٹھہرا رہا۔ یہ سارا ہوٹل اس دوران میں صرف سینکڑوں ہندوستانی مہمانوں سے بھرا رہا۔ ۹ اگست ۵۳ء کے بعد جب کبھی میں جیل سے باہر رہا مجھ پر حکومت کی طرف سے نگرانی کے لئے کار خاص کے آدمی ہشت پہر لگے رہتے تھے۔ میں لاہور میں چند ایک رشتہ داروں سے ملا۔ جن میں ان پاکستانی حاکموں یا افسروں سے کوئی ایک بھی نہیں تھا۔ جن سے ملنے کا الزام مجھے دیا جا رہا ہے۔ اگر بقول آپ کے ابتدا سے ہی میری ہمیشہ حرکات کا حکومت کو یا سنٹرل انٹیلیجنس ڈیپارٹمنٹ کو علم تھا۔ تو مجھے تخریبی کارروائیاں بروئے کار لانے کے لئے کھلی ڈھیل دینا کیا معنی رکھتا ہے۔ مجھے یہ کارروائیاں انجام دیتے ہوئے کیوں گرفتار نہیں کیا گیا۔ اور دو سال انتظار کیا گیا۔ میں نے یہ بھی عرض کیا کہ مجھے کسی تخریبی کارروائی خلاف حکومت پراپیگنڈہ۔ درآمد اسلحہ بارود بم وغیرہ کا کوئی علم نہیں ہے۔ [illegible] پاکستان سے کوئی تعلق نہیں ہے۔ میرا جواب سنکر سردار دلجیت سنگھ آگ بگولہ ہو گیا۔ اور دشنام کاری اور دھمکیوں کا ایک طوفان شروع کر دیا۔ مجھے بتایا گیا کہ اگر میں ان الزامات سے انکار کرنے پر بضد رہا۔ تو مجھے [illegible] افسوس کرنا پڑے گا۔ کیونکہ وہ مجرموں سے اقبال جرم حاصل کرنے کا ساری عمر کا تجربہ اور تمام ذرائع رکھتے ہیں۔ تم رو کر اور ہاتھ جوڑ کر [illegible] کرو گے کہ تمہاری گناہوں کی کہانی سننے کے لئے عذاب کی کارروائی بند [illegible] جائے۔ مگر تب تک عذاب بند نہیں کیا جائیگا۔ جب تک ہم کو یقین نہیں

سر اپٹی میں پھنسا کر کھڑا رہتا تھا۔ حالانکہ پیٹی کے اندر سے بھاگنے کا خیال تو دور خیال بھی محال تھا۔ کیونکہ یہ پیٹی سپاہیوں کے گھیرے کے ساتھ احاطہ کے اندر ہی واقعہ ہے۔ اور اس تک پہنچنے کے لئے چار فٹ سے زیادہ چوڑا کوچہ نہیں ہے۔ یہ سلسلہ عذاب برابر ۷ ماہ یعنی ۱۳ مارچ ۵۸ء سے ۳ مئی ۵۸ء تک جاری رہا۔ اور اس دوران میں میرا وزن ۲۲ پونڈ کم ہو گیا۔ یہاں تک کہ میری حالت مایوس کن ہو گئی۔ اور ایک پرائیویٹ ڈاکٹر رام اوتار نامی کو بلایا گیا۔ اس نے میرا علاج معالجہ کیا۔ اور کمرہ تبدیل کرنے اور گھنٹہ بھر باہر ٹہلانے کی سفارش کی۔ میرے دل اور گردے کی تکلیف کے نسخے بھی لکھے۔ مگر شاذ و نادر ہی کوئی دوائی لاکر دی گئی۔ اور نہ ہی ان کی باقی ہدایات پر عمل کیا گیا۔ سنٹرل انٹیلیجنس کے ان افسروں کو میں نے ان شاندار خدمات کی اسطر دیا جو کہ میں بحیثیت ڈپٹی کمشنر بارہ مولہ قبائلی حملہ کے فوراً بعد سیکرٹ سروس کی موجودگی میں انجام دیتا رہا۔ جس کے نتیجہ کے طور پر میں نے ان کو خطرہ میں ڈال کر ہزاروں ہندوؤں اور سکھوں کو بچایا۔ اور ان کی جائیداد بھی حاصل کر کے واپس دلائیں۔ جن کا ہر بگیڈیئر مذکور اور دیگر سینکڑوں لوگ اور بڑے افسر تصدیق کر سکتے ہیں۔ مگر میرے "محافظوں" نے ہرگز کوئی رحم نہ دکھایا اور صرف یہی مطالبہ ہوتا رہا کہ بیان حسب منشا دیدوں تاکہ اس پر مجسٹریٹ کی تصدیق کرائی جائے۔ اور یہ بیان کشمیر میں "رائے شماری" کا مطالبہ کرنے والے لیڈروں کے خلاف مقدمہ چلانے میں استعمال ہو سکے۔ اکثر بار کرنل حسن (ملٹری صاحب (جو ایک سکھ ہیں) اور اس محکمہ کے بڑے افسر ہیں۔ تشریف لائے تھے۔ ان سب کا مطالبہ یہی تھا۔ کہ میں ان کی مندرجہ بالا من گھڑت کہانی کی تائید کروں۔ میں نے ان سب کے سامنے اپنی بے گناہی

جاتا تھا۔ تو پانی مانگنے پر مجھے اپنا پیشاب جو میری زندان کی کوٹھڑی میں دنوں پڑا رہتا تھا میرے منہ میں زبردستی ڈالنے کی کوشش کی جاتی تھی۔ جب میں اس غلط کہانی کی تائید نہ کر سکا تو ایک رات ۲۰/۲۱ مارچ ۵۸ء شب دو بجے میرے منہ میں زبردستی پیشاب ڈال دیا گیا۔ اور کھانے کے بدلے ٹٹی کھلانے کی دھمکی دی گئی۔ اس بربریت اور حیوانیت میں سنٹرل ریزرو پولیس کے سپاہیوں کے علاوہ ایک انسپکٹر انٹیلیجنس، جو کہ خاص اس کام کے لئے دہلی سے لایا گیا تھا۔ اور دیوان سوہن لال سب انسپکٹر، سردار نجیت سنگھ اور سردار لچھمن سنگھ ڈی۔ ایس۔ پی کے علاوہ باری باری حصہ لیتے تھے۔ اس دوران میں رمضان مبارک کا مہینہ آیا اور تمام میرے روزے حرام کر دیئے گئے۔ ۱۲ مارچ ۵۸ء میرا ریمانڈ ختم ہونے پر پنڈت کانشی ناتھ صاحب مجسٹریٹ جس کا ذکر اوپر کیا گیا ہے کو حوالات میں بلا کر اس جگہ مزید ۱۴ گھنٹے کا ریمانڈ حاصل کیا گیا۔ جو کہ قانوناً ناجائز تھا۔ کیونکہ پولیس ریمانڈ کا پندرہ دن ختم ہو چکے تھے۔ اس کے بعد عذاب کی معیاد بڑھانے کے لئے میری نظربندی کو قانون نظربندی (Detention Act) کے تحت نظربندی میں تبدیل کیا گیا۔ اور مجھے جوڈیشل حوالات میں بھیجنے کے بجائے بدستور اسی Torture Chamber میں رکھا گیا۔ نظربندی کی سہولتوں از قسم بستر۔ چارپائی۔ اور کھانا وغیرہ سے کلیتاً محروم رکھا گیا۔ اور یومیہ خوراک کے بدلے اکثر دو خشک ٹکیے دیئے جاتے رہے۔ تاکہ عذاب برداشت کرنے کے لئے میری زندگی قائم رہ سکے۔ حجامت یا غسل کرنے کا سوال ہی پیدا نہیں ہوتا تھا۔ کبھی اگر رفع حاجت کے لئے سپاہیوں کے ساتھ والی جائے ضروری پر باہر لیجایا جاتا تھا۔ تو سپاہی ہتھکڑی کا دوسرا

To,

The Special Magistrate,
Jammu.

Subject :— *Written statement regarding treatment at the Interrogation Centre, Srinagar.*

Sir,

Reference correspondence resting with your honour's No. 113 S. M. dated 18-5-59, on the subject noted above the petitioner submites as under :—

(1) It has been clearly made out by the petitioner that a written statement was filed by him detailing out torture noted out to him at the Interrogation Centre Srinagar during March-April 1958. This statement was submitted as previously stated, on 11th June 1958, the very first day when the petitioner was brought and produced before your honour.

(2) On that very day three other accused namely Khwaja Ali Shah, Pir Abdul Ghani and Mir Mohd. Nazir also filed similar statements, when your honour refused to record our oral statements on the subject.

(3) The petitioner is at a loss to understand why his statement should be missing from the Court records. This is gravely prejudicial to his interests.

(4) The petitioner has kept a copy of the above statement for personal use, which under the circumstances, he encloses herewith for being placed on record so as to safeguard his interests.

(5) The petitioner also requests that necessary inquiry may kindly be made in order to locate the reasons accounting for the disappearance of the original statement.

(6) The petitioner further begs to remind that recently your honour was pleased to observe that it is not the practice of the Court to return documents or applications after they are submitted by an applicant. The petitioner requests that it will be unfair to the petitioner to make an exception in his case

اور لاتعلقیت کا اظہار کیا۔ آخر ۱۳ مئی ۵۸ء مجھے سنٹرل جیل سرینگر منتقل کیا گیا۔ اس وقت میری صحت کی حالت نہایت مایوس کن تھی۔ سرینگر سنٹرل جیل میں اس بات کی تصدیق سپیشل مجسٹریٹ صاحب پنڈت نیل کنٹھ گنجو سے ہوگئی کہ مجھے بمبینہ حضرت بل کیس میں پھنسایا گیا ہے۔

آج مورخہ ۱۱ جون ۵۸ء مجھے آپ کی عدالت میں پیش کیا گیا۔ اور معلوم ہوا کہ مجھے بمبینہ کذب سازش کیس میں بھی ملزم گردانا گیا ہے۔

مؤدبانہ التماس ہے کہ اس انسانیت سوز ظلم وستم کی تحقیقات فرمائی جائے۔ جو کہ موجودہ روشنی اور جمہوریت کے زمانہ میں مجھ پر مسلسل دو ماہ روا رکھا گیا ہے۔ جس کا مختصر سا ذکر درخواست ہذا میں کیا گیا ہے۔ تحریر ۱۱ ماہ جون سنہ ۵۸ء بمقام کد

عرض نیاز
دستخط غلام محمد (چکن)

نقل درخواست جو کہ سپیشل مجسٹریٹ صاحب کی خدمت میں مورخہ ۱۱ جون ۵۸ء بمقام کد سرینگر پیش کیا گیا۔
(دستخط) غلام محمد چکن بقلم خود بحروف انگریزی

to return his applications and refusec to place them on record in an important matter as the present one. The matter is closely connected with the petitioners-defence, and the departure from the established practice in his case is seriously prejudicing the petitioner.

It is therefore prayed that :—

(a) the enclosed written statement be kindly placed on record.

(b) Necessary enquiry be kindly made as to why and how the original statement referred to above disappeared from Court records.

Dated : 24-6-59.

Yours faithfully,
Sd. GHULAM MOHD. CHIKKEN.
Accused. No., 5.

Encls :—
Copy of the written statment in
Urdu presented on 11-6-58.
(Five leaves).

In the Court of the Special Magistrate, Jammu.

STATE *vs* MIRZA MOHD. AFZAL BEG AND OTHERS.

1. The humble petition on behalf of the prosecution most respectfully showeth :-

1. That yesterday a petition was filed by G. M. Chikken, accused. to the effect that on 11-6-58 he had filed a petition before this Court at Kud, making certain allegations and that petition is not to be found on the record of this case, and, therefore, he is filing a copy of that petition which he has preserved. The petition which he has filed alonwith it is a tale of torture, abuses, beatings, pouring of urine and other filth in his mouth. These are said to have been done by various officers at a so-called Interrogation Centre at Srinagar. The prosecution submits the following as rejoinder to this mnufactured

story of so-called torture etc. and filing of such an application on 11-6-58. The prosecution submits that no such application was filed by G. M. Chikken before the court and no such application is missing because it was not filed and whatever applications were filed by any accused, were all to be found on the record. That no such copy of any such petition was given to the prosecution.

2. That it is interesting to learn that the accused had made a thorough search of the record which has by this time become very voluminous and that themselves did not find this petition. The prosecution is wondering that on what particular date and under whose orders they searched the records and did not find their petition. As far as the prosecution knows a make-believe application was filed by this accused for a certified copy of the alleged petition and naturally when no such petition had been filed, the court intimated to the accused by an order that there is no such petition on the record and, therefore, giving of a certified copy was not possible. This manufactured petition was filed, because in the pamphlet published by so-called Lakhanpal giving a tale of grievances of the accused, it is mentioned that G. M. Chikken had filed such an application, as that pamphlet has been prepared for propaganda purposes in the interest of foreign power, and bring calumny in the State of Kashmir and India. It has been found necessary by the accused how to make an allegation that such an application had been filed. There is no reason why if such an application had been filed. It should disappear whereas petitions of other accused containing similar allegations filed in the court should remain on the record. This game obviously is being played to give to the world a tale of torture, sufferings and injustice committed on the accused so that this court may be intimidated and influenced against the prosecution. That there is no interrogation centre of the kind described in the petition at Srinagar. There are no doubt, police lock-ups at various places including the one mentioned by the accused and the prisoners are kept under Magistrate's orders. It is absolutely false that any torture as practised on G. M. Chikkan or that he was interrogated

in the Interrogation Centre in the way described, or that he was not allowed to sleep or that urine or the filths were used or that he was asked to support any particular case against any body. All the allegations made in the petition are false and manufactured and they have been put in for extraneous purposes and that purpose is to serve as an instrument of propaganda so that it may be included in some fresh pamphlet and may be utilised by the interested foreign power in making propaganda in the world. That the prosecution agains submits that these accused were playing the game of Pakistan during the period of the conspiracy and that game is still continued and whatever steps are being taken in this case are in consultation with and on the advice of Pakistan and to serve their strategy not merely in this country and Pakistan but also in the world. That the accused are aware that the prosecution is going to adduce impressive evidence about their being in the pay of Pakistan not merely during the peribd of conspiracy but even till now and to forestall such evidence, such a lie has been manufactured and is being sought to be placed on the record of the case. But so far as this accused, G. M. Chikken is concerned the prosecution is going to give evidence that he has been receiving money from Pakistan not merely during the period of conspiracy, but even after the period of conspiracy, and is anxious to get more money from Pakistan and naturally being obliged to Pakistan he is a party to such petitions which are for political propaganda purposes.

This petition bears unmistable indication that it cannot be a copy of any previous application said to have been filed but that this petition has been prepared after evidence has been recorded by this court and the prosecution will show such indications at the proper time. The prosecution can do nothing more than to refute at this stage and to deny the allegations maliciously made by the accused and this rejoinder may be kept on record.

Sd. Radha Kishen Kaul,
PUBLIC PROSECUTOR.

Dated 25th June '59

In the Court of Special Magistrate, Jammu.

STATE *versus* MIRZA MOHD. AFZAL BEG AND OTHERS.

The applicant submits as under :—

1. The applicant filed an application on 24-6-59, enclosing herewith a copy of his written statement presented to the Court on 11-6-58, in regard to torture, repression etc. inflicted on him while in the Interrogation Centre at Srinagar during Mach-April 1958.

2. The applicants prayer was simple :

"That in the absence of the original, the copy be placed on record."

3. To the said simple prayer, the prosecution has submitted a lengthy rejoinder date 25-6-59, bringing in extraneous and irrelevant matter, and throughout maligning the applicant and other accused.

4. The prosecution's rejoinder is mere calculated to whip up public propaganda and vitiate the atmosphere against the defence, rather than meet the simple issue i. e. whether a copy can be placed on record.

5. Without therefore going into the details of this irrelevant matter—which is not necessary in law—the applicant categorically refutes the baseless and malicious accusations and allegations made against the applicant and the other accused in the said rejoinder.

6. The applicant reaffirms whatever he has said in his original statement dated 11-6-58, as well as that repeated in his subsequent applications dated 14-4-59, 27-4-59 and 24-6-59.

7. It is the light of traversity of truth to characterise the assertions of the applicant as a "make-believe story" and brush aside summarily the avermants of the applicant based on solid proof. The applicant submitted the written statement through and in the presence of Messrs R. V. S. Mani, P. N. Raval and M. G. Mohd. the defence counsels. Further in the

application signed by Messrs P, N. Raval and M. G. Mohd. Advocates, dated 11-6-58, a clear statement was made seeking Court's permission to record his oral statement in relation to "the process of brain washing and other third degree methods in order to extort confessions" from him. The prosecution contention that the applicants plea is only an "after thought" is absolutely tenable.

8. The applicant is also an accused in the so-called Hazratbal Murder case. He has made a brief statement there as well in regard to repression and torture etc. inflicted on him in the Interrogation Centre referred to above. This was long before the prosecution started recording evidence in the present case. Therefore the prosccution allegation that "this petition has been prepared after evidence has been recorded by this Court—"—vide last para of the said rejoinder—cannot at all hold water.

9. It was only after the Court expressed its inability to record the oral statement that the written statement was filed by the applicant along with others.

10. In addition to what has been stated in para 7 above, the prosecution's admission about the fact of submission by the applicant of the said statement is a conclusive proof of that facture, and the prosecution cannot wriggle out of it. This has reference to prosecution counter affidavit dated 18-2-59 filed in the Supreme Court, through Mr. A. K. Mengi the Prosecution Inspector. In the face of this it hardly lies in the mouth of prosecution to resile from that position.

11. The allegation made in para 2 of the rejoinder that "the accused had made a thorough search of the record" is again baseless and the prosecution have significantly omitted to quote reference as to where and who made such an asserstion. What follows in the paragraph is therefore malicious and therefore malafide. So is the allegation that applicants' petition is "manufactured" and intended to support, "the pamphlet published by so-called Lakhan Pal" about which this applicant knows nothing. Furthermore there is not a grain of truth

about the flat denial of the very existence of the Interrogation Centre and the activities that have been going on there. The accused are astounded to hear such denials of hard realities and sordid facts made by no less persons than Public Prosecuters who are enjoined by law and universally established practice to place before the Court all relevant facts whether in favour of the one party or the other. The accused's astonishment is still greater when the denial relates to the very existence of the Interrogation Centre where number of the accused and good many other citizens of Kashmir have suffered inhuman torture, brain washing and third degree methods for weeks and even months on end.

12. The applicant further, categorically denies allegations of receipt of money or any connection whatever with Pakistan. These and similar other allegations have been made with a view to poison the mind of the Court, vitiate the public atmosphere antagonize the mankind against the accused and render impossible a fair and just trial. As regards the imputation of motive that the accused are filing petitions for world propaganda etc. the applicant submits that the boot is on the other leg. This is fully borne out by the prosecution's present rejoinder.

The applicant therefore humbly prays that :—

(a) The prosecution's said rejoinder be rejected,

(b) Copy of the written statement enclosed with the applicant's application dated 24-6-59 be placed on record and

(c) The prosecution be directed to refrain from importing and extraneous matters in their petition as well as from the campaign of maligning the accused persons.

Sd. Ghulam Mohd. Chikkan.

Special Jail, Jammu:
Dated 29-6-59.

Presented by Mr. Ghulam Mohd. Chikkan.
File.
Sd. N. K. Hak, Special Magistrate,
4-7

resent.

Counsel for the parties and accused, excepting M/s Hamdani, Amin and Sufi Mohd. Akbar.

ORDER.

Mr. Chicken filed his objections to this petition of prosecution.

Both sides are agreed to the retention of the copy of the alleged written statement of Mr. Chikkan, on the record.

This Court has, vide its order dated 29-6-59 ordered return of that alleged written statement to Mr. Chikan and also return of rejoinder to the prosecution.

Now as both parties are agreed to its retention, therefore it is ordered that the alleged written statement together with the rejoinder of prosecution and objection may be retained on the record and order dated 29-6-59 deemed revised accordingly.

Announced.
4-7-1959.

Sd. N. K. Hak
Special Magistrate.

بعدالت سپیشل مجسٹریٹ صاحب جموں واقعہ 30-6-59
سرکار بنام مرزا محمد افضل بیگ وغیرہ

[Presented by Mr. Latif Advocate. File S. M. 30-6]

عزرات منجانب ایڈوکیٹ ملزمان متعلقہ درخواست منجانب استغاثہ بتاریخ 26-6-59 متعلقہ پیش کرنے سپلیمنٹری لسٹ

جناب عالی۔

عزرات حسب ذیل گزارش ہے۔

(1) یہ کہ درخواست ہائے استغاثہ کسی ضابطہ اور قانون کے تحت نہیں اور نہ کسی قانون یا ضابطہ کا حوالہ استغاثہ نے دیا

ہے اسلئے یہ درخواست ہا قابل پذیرائی ہیں اور مسترد کی جانی لازمی ہے۔

(2) یہ کہ عدالت ہذا کو ایسی فہرست لینے اور Supplementary List of Witnesses کی فہرست لینے یا مثل میں شامل کرنے یا غور کرنے کی کوئی قانونی یا ساعتی جواز یت حاصل نہیں ہے۔

(3) یہ کہ استغاثہ نے ایک خلاف قانون اور اختیارات کا ایک غلط استعمال روبہ اختیار کیا ہے۔ جو کہ نا انصافی کسی بھی معقولیت کی حد تک نہیں پہنچتا ہے بلکہ ملزمان کے fair trial میں مسلسل prejudice کا ذریعہ بن رہا ہے۔

(4) یہ کہ یہ مسلمہ امر روئیداد مثل و استغاثہ سے عیاں ہے۔ کہ استغاثہ نے وہ تمام پوچ ہائے علت و ضمنیات مرتب شدہ کا بناء استغاثہ میں استعمال کیا ہے۔ اور یہی بقول استغاثہ و گورنمنٹ آرڈر استعمال کیا ہے۔ اور یہی بقول استغاثہ و گورنمنٹ آرڈر material پیش کردہ گورنمنٹ تھا۔ جبکہ خلاف ملزمان استغاثہ دائر کرنے کی اجازت دیگئی۔ اور اب prosecutor کے اختیارات کا غلط استعمال عریاں ہے۔ جبکہ وہ بیشتر co-conspirators کی فہرست پیش کرتے ہیں۔ اسلئے بھی درخواست قابل مسترد ہے۔

(5) یہ کہ استغاثہ تمام investigations متعلقہ مختلف پرچہ علت ہا کو چلائے ہوئے حسب منشاء خود ردوبدل ضمنیات کرتے ہوئے ہر ایک شخص کو جو کہ ملزمان کے خیرخواہ رشتہ دار لواحقین ہوں کو مرعوب اور اپنی ایک جھوٹی استغاثہ کی من گھڑت کہانی کو قائم رکھنے کے لئے اسطرح کی مزید گواہان کی لسٹ و فہرست co-conspirators کا ایسا حربہ استعمال کیا ہے۔ جو کہ قانون کے تقیض کے ہوتے ہوئے ملزمان کے

fair trial میں بسدراہ ہے - علاوہ از مذکورہ رشتہداران ملزمان غیر متعلق اور نامعلوم اشخاص کو بھی فہرست میں شامل کیا گیا ہے -

(6) عدالت پر یہ امر مثل سے عیاں ہے - اس پیش بندی کے لئے ملزمان نے مسلسل استدعا کی ہے اور کر رہے ہیں - کہ تمام investigation کے تمام کاغذات مع ضمنیات عدالت طلب کرائے - تاکہ اس مضحکہ خیز اور غیر قانون صورت میں ملزمان بچ سکیں -

(7) یہ کہ criminal jurisprudance اور ضابطہ فوجداری کی ایسی تعبیر اور استعمال جو کہ صریحاً منافی natural justice ہے - اور یہ رویہ اس مقدمہ میں اپنی ایک مثال ہے - جو کہ ملزمان کو prejudice کرتے ہوئے ان کے بنیادی حقوق کو ختم کر رہی ہے - اسلئے بھی درخواست استغاثہ قابل مسترد ہے -

(8) یہ کہ ملزمان کی جراح سے جو جھوٹی مبینہ کہانی استغاثہ اور مضحکہ خیز بن جاتی ہے تو اب استغاثہ نے اسکے لئے بھی ایک نیا ایسا طریقہ استعمال میں لایا ہے - جس سے صاف عیاں ہے کہ پولیس کو اتنے کھلے لامحدود غیرقانونی اختیارات دئے گئے ہیں کہ تمام پرچہ علت ہا کو رواں رکھتے ہوئے جب چاہیں کوئی بھی جھوٹا گواہ تیار کر کے اُسکا بیان قلمبند کریں - اور پھر اِس مبینہ استغاثہ میں اِسکو بطور گواہ پیش کرائیں سال 1953 سے گزشتہ سال تک پرچہ علت ہا اس مقصد کے لئے جاری رکھے گئے ہیں - اِس قسم کی investigation جنکی تکمیل ہونے میں نہ آتی ہو جمہوریت میں اِس قسم کی تعبیر قانون اور پولیس کے ناجائز اِختیارات اپنی مثال آپ ہیں - اِسلئے بھی درخواست اِستغاثہ قابل استرداد ہے -

(9) یہ کہ یہ امر اب اِس حد تک عیاں ہے - کہ اِستغاثہ

ضمنیات کے پیش کرنے سے کیوں ہچکچاتا ہے اور تمام افراد ضبطی و منضبط چیزوں کو پیش نہیں کرتا ہے - کیونکہ اِستغاثہ یہ جانتے ہوئے کہ اسمیں اِستغاثہ کی کہانی کو جھوٹ اور لغو ثابت کرنے کا مواد ہے - اب مختلف مبینہ investigations سے مواد حاصل کرکے ایک نیا کیس خلاف ملزمان بنا رہا ہے جو کہ ناجائز ہے -

(10) اِستغاثہ کا ایتریس جو کہ مشتمل تمام واقعات مندرجہ پولیس تائریز پر تھا - اور اب اس پر Additions, qualifications اور شہادت manufacture کرنے کا ایک نہایت ہی غیر قانونی اور ناانصافی وطیرہ اِستغاثہ سے شروع کیا ہے - جسکا بند کرانا عدالت پر ایک منصب فرضی کی طرح عائد ہوتا ہے - جیسا کہ اِن درخواستہا پیشکرنے سے ظاہر ہے -

(11) یہ کہ اب ایسی شہادت کا فراہم کرنا co-conspirator کی اِس طریقہ کی فہرست جبکہ گورنمنٹ کو بھی ایسا material بوقت sanction نہ فراہم کیا ہو لا قانونی کی اپنی ایک مثال ہے - اور جبکہ عدالت کو بھی کوئی اِختیارات سماعت حاصل نہ ہو -

اِس لئے بوجوہات بالا اِستدعا ہے کہ ہر دو درخواست ہا مسترد فرما کر ملزمان کے حق میں اِنصاف فرمایا جائے

عرضی نیاز

محمد لطیف ایڈوکیٹ -